APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1660

STANLEY BLACKLEDGE, Warden,
Central Prison, Raleigh, N.C. and
STATE OF NORTH CAROLINA,
Petitioner,

v.

JIMMY SETH PERRY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED JUNE 11, 1973
CERTIORARI GRANTED OCTOBER 15, 1973

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TRANSCRIPT OF PLEA

The Transcript of Perry's plea is set out in the Petition for Certiorari at pages 9-11.

RELEVANT PORTION OF PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

1. That the petitioner was brought to trial on or about August 20, 1969, in the District Court for Northampton County, on a charge of assaulting a fellow inmate at the Odom Farm Unit of the North Carolina Department of Correction. That upon conviction the petitioner was given a six months sentence. That due to the fact that he was told that this six months was a consecutive sentence he appealed same to Northampton Superior Court. That he was tried and sentenced for a misdemeanor in Northampton District Court.

2. That on October 29, 1969, the petitioner was brought to trial in Northampton Superior Court, upon the felonious charge of assault with a deadly weapon with intent to kill inflicting serious bodily harm. That the petitioner at first would not plead guilty to the charge, but upon being informed by the Solicitor that if he would plead guilty, that he would be given a concurrent sentence, and would not get any more time. Thereupon the petitioner entered a plea of guilty and was sentenced to a 5 to 7 year sentence, to run concurrently with the sentence for which he was already serving. That the North Carolina Department of Correction since the two sentences of 5 to 7 were of equal length, started him on the sentence of 5 to 7 years received in Northampton County. That this deprived the petitioner of credit on this 5 to 7 years of the time he had already made on the first 5 to 7 years imposed in Wilson County, thereby the promise of concurrent sentence of not receiving anymore time given to the petitioner in exchange for the guilty plea was broken.

3. Petitioner contends that in light of recent decisions of the United States Supreme Court and the United States Fourth Circuit Court of Appeals, harsher sentencing after a sentence is vacated and a new trial is granted, and upon conviction at such retrial is violative of his constitutional rights. See: *Patton v. North Carolina* (4th Cir.), 318 F.2d 636 (1967) cert. den. 390 U.S. 905 (1968). See: *Benton v. Maryland*, 395 U.S. 784; *Pearce v. North Carolina*, 395 U.S. 711; *Waller v. Florida*, 397 U.S. 387.

4. Petitioner contends that although *Patton* and *Pearce* were decided upon a retrial after a post conviction judgment had invalidated Patton's original sentence, the tantamount effect relative to the instant case is a deprivation of basic constitutional rights and an implicit

double jeapardy violation constituting multiple punishment in violation of petitioner's constitutional rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

5. That the petitioner is informed and believes that this Court has already granted a writ of habeas corpus to a petitioner in the same situation as to the increase in sentence from District Court to Superior Court as this petitioner in *Torrance v. Henry* (E.D. N.C. late 1969 or early 1970), writ being granted by Judge Butler.

SECTION 11(b)

Petitioner contends that to sentence him to a harsher sentence in the Superior Court not only offends the principle of fair dealing in that the sentence exceeds in the minimum portion thereof his original sentence in the District Court by 4½ years, and 6½ years on the maximum, but to change it from a misdemeanor in District Court to a felony in Superior Court, after the District Court had accepted the guilty plea to a misdemeanor, compounds the injury to his rights, as denoted in *Patton v. North Carolina, supra,* the Court stated:

> "The risk of denial of credit, or the risk of a greater sentence, or both on retrial, may prevent defendant who have been unconstitutionally convicted from attempting to seek redress. For this reason, the District Court declared that predicating Patton's constitutional right to petition for a fair trial on the fiction that he had consented to a possibly harsher punishment, offends the due process clause of the Fourteenth Amendment."

Whereupon, as specified in *Patton,* by the Court, quoting from *Fay v. Noia,* 372 U.S. 391 (1963):

"The law should not, and in our judgment does not place the defendant in such an incredible dilemma."

And further in *Patton* the Court stressed:

"North Carolina deprives the accused of the constitutional right to a fair trial, then dares him to assert his right by threatening him with the risk of a longer sentence. It *may not* exact this price. Enjoyment of a benefit or protection provided by law cannot be conditioned upon the 'waiver' of a constitutional right." (emphasis added.)

Petitioner's rights were severely impinged by this subsequent relinquishment of his *lighter* District Court sentence of 6 months whereby he was placed in jeopardy of receiving a harsher sentence. And did receive a harsher sentence of 5 to 7 years. Petitioner's argument is that the connotation inherent in this system of arbitrary and restrictive retrial measures, as practiced by the State of North Carolina, can only be that such is, and should be so deemed, offensive to the administration of fair and impartial justice.

Wherefore, petitioner prays that this Court will grant relief in this matter to the end that the 5 to 7 year sentence imposed upon the petitioner at the Superior Court retrial of the District Court conviction in this matter will be set aside or vacated and the Respondent ordered to re-sentence the petitioner to a sentence of not more than six months, or that since the six months sentence to be served in this case has long expired, that the Court issue the Writ of Habeas Corpus, and wipe this unconstitutional 5 to 7 years off the records, and that the Court grant such other, further, and different relief as to the Court may seem just and proper under the circumstances.

RELEVANT PORTIONS OF AMENDMENT TO APPLICATION FOR WRIT OF HABEAS CORPUS

* * * * *

"The petitioner contends that his constitutional rights secured to him by the Fifth and Fourteenth Amendments to the United States Constitution, were violated and abridged by the imposition of a harsher sentence for a greater offense upon the re-trial from the Northampton District Court conviction and 6 months sentence for a misdemeanor to the felony charged in Northampton Superior Court and imposition of a 5 to 7 year sentence, as this constituted both double jeopardy and a denial of due process of law. (This is a clarification and modification of the two grounds set out in Section 10(a) and 10(b))."

* * * * *

The petitioner contends that the denial of credit to him as time served upon the sentence imposed at the August 1968 Session of Wilson County Superior Court of the time spent in physical custody and confinement after he was placed in jeopardy for the offenses resulting in his convictions is violative of constitutional rights secured to him by the 5th, 8th and 14th Amendments to the United States Constitution."

* * * * *

1. That the petitioner was brought to trial at the August 20, 1969 Session of the District Court of Northampton County upon the misdemeanor charge of assault and upon conviction was sentenced to a term of six months. (That the petitioner was told at the time of trial that it was to run concurrently, but later due to the fact that he was informed back at the Unit that it was consecutively he appealed to the Superior Court.)

2. That the petitioner was brought to trial upon the re-trial in this matter on October 29, 1969 in Northampton Superior Court upon the felony charge of assault with a deadly weapon with intent to kill inflicting serious bodily harm. (That upon being informed by the Solicitor Mr. Burgwyn and his Attorney Thomas W. Henson, that if he would plead guilty that he would not get any more time than he then had, and that the Judge was going to go along with this, the petitioner allowed and assented to a plea of guilty.)

3. That as indicated by the Judgment and Commitment in this cause, Judge Ragsdale, who had been recently appointed a Superior Court Judge at that time thought he was not giving the petitioner any more time. See Judgment and Commitment, attached hereto as Appendices Page A-1:

> "It is ADJUDGED that the defendant be imprisoned for the term of not less than five (5) nor more than seven (7) years in the State Prison at Raleigh under the supervision of the North Carolina Department of Corrections. This sentence to run *concurrently* and *together* with the sentence for forgery which the defendant is now serving."

That it is clear from the Judgment that Judge Ragsdale did not think he was giving the petitioner any more active time. But due to the nature of North Carolina Law, this sentence was started by the Department of Correction on October 29, 1969, which meant in toto that the petitioner was getting a sentence of One (1) year and five (5) months and one (1) day more active time to be served by him, i.e. he was arrested on the Wilson County charges May 28, 1968 and it is plain that from May 22, 1968 until October 29, 1969 is a span of 17 months and 1 day.

That as a matter of law, the 5 to 7 years imposed in Northampton Superior Court upon the felony charge

after the petitioner had been convicted in Northampton District Court of a misdemeanor and a six month sentence imposed is constitutionally defective. See: The companion case of *Rice v. North Carolina*, 434 F.2d 297 (1970); *Wood v. Ross (Rose)*, wherein it was held that the imposition of a harsher sentence for a greater offense upon retrial constituted both double jeopardy and a denial of due process.

That the Court in the Order entered in this cause, asked for the reasons for this court not to grant a new trial in this matter. It is clear from the face of the record in this cause that the State of North Carolina has no legitimate interest in a retrying of this cause, in that: It is clear that the new trial would have to upon (sic) a misdemeanor in the Superior Court and that the Superior Court would be held to the imposition of a concurrent sentence in this matter, as clearly the trial Judge in this matter at the first trial in Superior Court stated unequivocably that the sentence he was imposing was both concurrent "and together with the sentence for forgery which the defendant is now serving" (A-1).

That it would be clearly vindictive action, if he the petitioner upon trial de novo in this matter was given a consecutive sentence in the Superior Court forbidden by *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). That a two year concurrent sentence imposed in this matter effective as of the original trial date of October 29, 1969, which it must be constitutionally would have no effect in this matter, and therefore the State of North Carolina has no legitimate reason for wanting a new trial in this matter, as such would be a mere formality and of no real substance.

* * * * *

The petitioner was arrested on the Wilson County charges on May 28, 1968 and held in jail until the trial

date in this matter of August 29, 1968, he then took an appeal to the North Carolina Court of Appeals, that upon the finding of "No error" the petitioner was committed to prison on January 15, 1969.

The petitioner spent from May 28, 1968 until August 29, 1968 awaiting trial in this matter of the Wilson County sentence in custody and confinement.

The petitioner spent from August 29, 1968 until January 15, 1969 in custody and confinement awaiting the appeal determination.

Since the petitioner has no state remedy as to the jail time credit in this matter, and this matter should be decided at one time, it is respectfully requested that this Court rather than have the petitioner have to seek further relief decide this whole matter at one time. Since upon being allowed credit on the Wilson Court Superior Court sentence of 5 to 7 years of the time spent from May 28, 1968 until January 15, 1969, it appears that the petitioner has already served flat time a period of 4 years and 1 Month and 7 days as of the date of the filing of this action (July 5, 1972). That this 4 years and 1 month and 7 days far exceed the good time release of this petitioner if he is credited with the gained time he already has accumulated in this matter. That he has already exceeded his minimum release date by over a year.

That the petitioner asks this court to apply applicable recent conceptual developments in the constitutional case law principles governing the relief sought herein and grant the petitioner credit upon the 5 to 7 years imposed in Wilson Superior Court in August, 1968 for uttering a forged instrument the time from May 28, 1968 until trial date spent in custody and confinement and the time spent on appeal from August 29, 1968 until January 15, 1969 (the current commitment date as credit as time served toward his release date, his parole eligibility date,

his honor grade eligibility date and other privileges accruing solely on the basis of time served. The total time sought is 7 months and 18 days credit as time served on the present commitment date of January 15, 1969 for this 5 to 7 years from Wilson County.

DECISION OF THE UNITED STATES DISTRICT COURT

The decision of the United States District Court is set out in the Petition for Certiorari at pages 12-20.

DECISION OF THE COURT OF APPEALS

The decision of the Court of Appeals for the Fourth Circuit is set out in the Petition for Certiorari at page 8.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 72-1660

STANLEY BLACKLEDGE, WARDEN,
CENTRAL PRISON, RALEIGH, N.C.
AND STATE OF NORTH CAROLINA,
Petitioners,

-vs-

JIMMY SETH PERRY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
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No.

STANLEY BLACKLEDGE, WARDEN,
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Petitioners,

-vs-

JIMMY SETH PERRY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Stanley Blackledge and the State of North Carolina, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit in the case of *Jimmy Seth Perry v. Stanley Blackledge, Warden, Central Prison, Raleigh, N.C. and State of North Carolina*, No. 72-2182, filed April 10, 1973.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit filed April 10, 1973, is not reported, and is printed as Appendix A to this petition.

JURISDICITON

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

IS DOUBLE JEOPARDY A NON-JURISDICTIONAL MATTER WHICH IS WAIVED BY A VOLUNTARY AND INTELLIGENT PLEA OF GUILTY?

II

MUST A DEFENDANT BE SPECIFICALLY ADVISED THAT A GUILTY PLEA WAIVES HIS RIGHT TO CONTEST DOUBLE JEOPARDY?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article V

"No person . . .shall . . .be subject for the same offense to be twice put in jeopardy of life and limb."

U.S. Constitution, Article XIV

"No State . . .shall . . .deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

In August 1969, Jimmy Seth Perry was convicted in the District Court for Northampton County, North Carolina, on a warrant charging him with the misdemeanor of assault with a deadly weapon. He received a sentence of six months imprisonment. This was to be served after a sentence of 5 to 7 years for uttering a forged instrument which had been imposed in August of 1968 in a different court; and which sentence actually began in January 1969. Perry appealed the assault conviction to the Superior Court and received a trial *de novo*. However, during the interim between

appeal and trial *de novo*, the solicitor obtained an indictment charging him with a higher and felonious degree of the crime and it was this on which he was tried rather than the warrant. In October 1969, he plead guilty and received 5 to 7 years to be served concurrently. The transcript of plea is Appendix B. As the uttering sentence began January 15, 1969, and this assault sentence began on October 29, this was in effect, an additional sentence of about 9 months and 14 days or about 3 months and 14 days over the sentence of six months given for assault in the District Court.[1]

Petitioner, after exhausting state remedies, filed for a writ of habeas corpus which was allowed by Honorable John D. Larkins, Judge, United States District Court, Eastern District of North Carolina. The decision of Judge Larkins is attached as Appendix C. He found that the indictment of petitioner for the higher offense pending trial *de novo* was double jeopardy, relying on *Wood v. Ross*, 434 F. 2d 297 (4th Cir. 1970); that the first trial constituting a binding election and the second a chilling of the right to appeal; and that double jeopardy could not be waived, it going to the power to retry Perry. On appeal this was affirmed by the United States Court of Appeals for the Fourth Circuit without discussion.

REASONS FOR GRANTING THE WRIT

I

THE FOURTH CIRCUIT DECISIONS AND THOSE DECISIONS OF THE OTHER CIRCUITS CONFLICT ON WHETHER OR NOT THE DEFENSE OF DOUBLE JEOPARDY IS WAIVED BY A GUILTY PLEA.

The decision in this case rests on the decision in *Wood v. Ross*, 434 F. 2d 297 (4th Cir. 1970) which case, in a dictum, indicated the defense of double jeopardy would not be waived by a guilty plea. This is contrary to the decisions of the 5th, 7th, 8th, 9th and 10th Circuit Courts of Appeals, *Grogan v. United States*, 394 F. 2d 287 (5th Cir. 1967); *United States v. Hoyland*, 264 F. 2d 346 (7th Cir. 1959); *Kistner v. United States*, 332 F. 2d 978 (8th Cir. 1964); *Western Laundry & Linen Rental Co. v. United States*, 434 F. 2d 44 (9th Cir. 1970); *Cox v. Crouse*, 376 F. 2d 824 (10th Cir. 1967); each of which holds this defense waivable by a guilty plea. State cases to the same effect are set out in 22

CJS, p. 710 and a larger collection of federal cases to the same effect is set out in 16 FPD 428, Key #204. These cases rather than the instant one are correct for a guilty plea waives non-jurisdictional defects, *Vanater v. Boles*, 377 F. 2d 898 (4th Cir. 1967).

II

THE FOURTH CIRCUIT HAS AFFIRMED A DECISION IN THE DISTRICT COURT WHICH CONFLICTS WITH THE DECISIONS OF THIS COURT REGARDING THE STANDARDS FOR JUDGING GUILTY PLEAS.

The district Court judge used as an alternative basis for decision that the right to be free of double jeopardy is "the type of fundamental right which cannot be waived by mere silence in the record. It goes to the power of a court to try a person." However, neither of these provide a basis for allowing the writ.

With the regard to the first, the test of a guilty plea's validity, insofar as its intelligent nature is involved, is whether or not it was an act "done with sufficient awareness of the relevant circumstances and likely consequences", *McMann v. Richardson*, 397 U.S. 759 25 L.ed. 2d 763, 90 S.Ct. 1449 (1970), *Brady v. United States*, 397 U.S. 742, 25 L.ed. 2d 474, 90 S.Ct. 1463 (1970). This, however, does not require enumeration of all constitutional rights waived by a plea, *Tollett v. Henderson*, _____ U.S. _____, _____ L.ed. 2d _____, 93 S.Ct. 1602 (1973); *Wade v. Coiner*, _____ F. 2d _____ (4th Cir. 1973), *Redwine v. Zuckart*, 317 F. 2d 336 (App DC 1963), *Morales-Juargardo v. United States*, 440 F. 2d 775 (5th Cir. 1971). In this case, an exhaustive examination of petitioner was made at the time of his plea in order to determine if it was an intelligent and voluntary act; and the answers obtained from petitioner show that in making his plea, he had the requisite "sufficient awareness."

With regard to the second, the fact that a defense of double jeopardy goes to the power to try a defendant does not permit a different result. A statute of limitation likewise goes to the power to try, yet it is apparently waivable, *Biddinger v. Police Commissioner*, 245 U.S. 128, 62 L.ed. 193, 38 S.Ct. 41 (1917). Additionally, an illegal search and seizure, an illegal confession, an

illegal identification, the lack of speedy trial, or defects in obtaining an indictment could prevent trial itself if determined in advance of trial and thus could defeat the power to try. These are waived by a guilty plea. In any event, the prohibition of the double jeopardy clause does not appear to be self-executing and to forbid the obtaining of an indictment itself so as to wholly defeat an attempted prosecution before it begins. Instead the law, generally, is that defenses must be pleaded and that the trial is the proper place to do so, *Younger v. Harris*, 401 U.S. 37, 27 L.ed. 2d 669, 91 S.Ct. 746 (1971); *Braden v. Kentucky*, _____U.S. _____, 35 L.ed. 2d 443, 93 S.Ct. 1123 (1973).

CONCLUSION

The United States Court of Appeals for the Fourth Circuit has, by its decision, both created a conflict among the circuits and misapplied the decisions of this Court, and therefore certiorari should issue to resolve the matters at issue in this proceeding.

This the _____ day of June, 1973.

Respectfully submitted,

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NOTE

1

The District Court noted that the sentence could be viewed as giving an additional term of about 17 months since under North Carolina law at that time petitioner received no credit for pretrial custody on or custody pending appeal of his uttering conviction. This was later required as a matter of constitutional law by the Fourth Circuit as to appeal custody time, *Cole v. North Carolina*, 419 F. 2d 127 (4th Cir. 1969), based on *North Carolina v. Pearce*, 395 U.S. 711, 23 L.ed. 2d 656, 89 S.Ct. 2072 (1969); and subsequent District Court decisions in North Carolina applied this to pretrial custody, which the 4th Circuit ultimately endorsed, *Ham v. North Carolina*, _____F. 2d_____ (4th Cir. 1973). He received this additional credit on his uttering charge by virtue of the order in this case, thereby advancing his sentence beginning date on the uttering conviction so as to create this 17 month interim.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing PETITION on Respondent by placing three copies in the United States Mail at Raleigh, North Carolina, postage prepaid, addressed to his attorney, James E. Keenan, Esquire, Post Office Box 1003, Durham, North Carolina, 27702, on the _____ day of June 1973.

Richard N. League
Assistant Attorney General

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-2182

JIMMY SETH PERRY,
Appellee,

-vs-

STANLEY BLACKLEDGE, WARDEN,
CENTRAL PRISON, RALEIGH, N. C.
AND STATE OF NORTH CAROLINA,
Appellants.

Appeal from the United States District Court
for the Eastern District of North Carolina,
at Raleigh. John D. Larkins, Jr., District Judge

MEMORANDUM DECISION

A review of the record and of the district court's opinion discloses that an appeal from the order of the district court granting habeas corpus relief would be without merit. Accordingly, for the reasons stated by the district court, and upon the further authority of *Ham v. State of North Carolina*, _____F.2d_____ (4th Cir. 1973), the order is affirmed.

The Clerk is directed to file with this memorandum decision a copy of the district court's opinion.

s/ J. Braxton Craven, Jr.
United States Circuit Judge

s/ John D. Butzner, Jr.
United States Circuit Judge

s/ Donald Russell
United States Circuit Judge

APPENDIX B

File # *69-Cr-2135*
Film # *69-3-1516*
In the General Court of Justice
Superior Court Division

STATE OF NORTH CAROLINA
COUNTY OF *Northampton*

STATE OF NORTH CAROLINA

vs. TRANSCRIPT OF PLEA

Jimmy Perry

The Defendant, being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

1. Are you able to hear and understand my statements and questions?

   Answer: *Yes*

2. Are you now under the influence of any alcohol, drugs, narcotics, medicines, or other pills?

   Answer: *No*

3. Do you understand that you are charged with the (felony) (~~misdemeanor~~) of *assault with a deadly weapon with the intent to kill inflicting serious injury, not resulting in death*?

   Answer: *Yes*

4. Has the charge been explained to you, and are you ready for trial?

   Answer: *Yes*

5. Do you understand that you have the right to plead not guilty and to be tried by a Jury?

   Answer: *Yes*

6. How do you plead to these charges - Guilty, not Guilty, or nolo contendere?

   Answer: *Guilty*

7. (a) Are you in fact guilty? (omit if plea is nolo contendre)

   Answer: *Yes*

(b) (If applicable) Have you had explained to you and do you understand the meaning of a plea of nolo contendere?

Answer: _____

8. Do you understand that upon your plea of (guilty) (~~nolo contendere~~) you could be imprisoned for as much as *10* (~~months~~) (years)?

Answer: *Yes*

9. Have you had time to subpoena witnesses wanted by you?

Answer: *Yes*

10. Have you had time to talk and confer with and have you conferred with your lawyer about this case, and are you satisfied with his services?

Answer: *Yes*

11. Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promise or threat to you to influence you to plead (guilty) (~~nolo contendere~~) in this case?

Answer: *No*

12. Has anyone violated any of your constitutional rights?

Answer: *No*

13. Do you now freely, understandingly and voluntarily authorize and instruct your lawyer to enter on your behalf a plea of (guilty) (~~nolo contendere~~)?

Answer: *Yes*

14. Do you have any questions or any statement to make about what I have just said to you?

Answer: *No*

I have read or heard read all of the above questions and answers and understand them, and the answers shown are the ones I gave in open Court, and they are true and correct.

s/ Jimmy D. Perry
Defendant

Sworn to and subscribed before me this *29* day of *October*, 1969.

s/ George R. Ragsdale
Judge Presiding

ADJUDICATION

The undersigned Presiding Judge hereby finds and adjudges:

I. That the defendant, *Jimmy Perry*, was sworn in open Court and the questions were asked him as set forth in the Transcript of Plea by the undersigned Judge, and the answers given thereto by said defendant are as set forth therein.

II. That this defendant, was represented by attorney, *Thomas W. Henson*, who was (court appointed)(~~privately employed~~); and the defendant through his attorney, in open Court, plead (guilty) (~~nolo contendere~~) to *felonious assault* as charged in the (~~warrant~~) (bill of indictment) and in open Court, under oath, further informs the Court that:

1. He is and has been fully advised of his rights and the charges against him;
2. He is and has been fully advised of the maximum punishment for said offense(s) charged, and for the offense(s) to which he pleads (guilty) (~~nolo contendere~~);
3. He is guilty of the offense(s) to which he pleads guilty;
4. He authorizes his attorney to enter a plea of (guilty) (~~nolo contendere~~) to said charge(s);
5. He has had ample time to confer with his attorney, and to subpoena witnesses desired by him;
6. He is ready for trial;
7. He is satisfied with the counsel and services of his attorney;

And after further examination by the Court, the Court ascertains, determines and adjudges, that the plea of (guilty) (~~nolo contendere~~), by the defendant is freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ORDERED that his plea of (guilty) (~~nolo contendere~~) be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded.

This *29* day of *October*, 19*69*.

s/ George R. Ragsdale
Judge Presiding

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

No. 2800 Civil

JIMMY SETH PERRY,

V.

DR. STANLEY BLACKLEDGE, Warden, Central Prison, Raleigh, North Carolina, and STATE OF NORTH CAROLINA,
Respondents

MEMORANDUM OPINION AND ORDER

LARKINS, District Judge:

This cause comes before the Court in an action seeking a writ of habeas corpus, pursuant to the provisions of Title 28, United States Code, Section 2254. This case had been originally dismissed by this Court for failure to exhaust available State remedies on August 16, 1971. On appeal, the 4th Circuit Court of Appeals remanded the case to this Court with instructions that action be deferred upon the case pending the outcome of *North Carolina v. Rice*, 434 F.2d 297 (4th Cir. 1970) *cert granted*, 39 L.W. 3437 (No. 1325, 1971). That case has since been remanded to the 4th Circuit Court of Appeals by the Supreme Court, 40 L.W. 4073, with directions that a determination of mootness be made by that Court. The 4th Circuit, in turn, remanded the case to the United States District Court for the Western District of North Carolina for such a determination. In hearing before the District Court, it was discovered that Rice had died, and that the case seemed moot. At any rate, this Court feels, in light of the recent decision of the Supreme Court of the United States in the case of *Colton v. Kentucky*, _____U.S. _____, 32 L Ed 2d 584, _____S.Ct._____ (1972), that the present case is ready for

adjudication before this Court on May 6, 1972, this Court Ordered that an attorney be appointed to represent Petitioner in this action, and that briefs be filed within 60 days setting forth the collateral effects which Petitioner's harsher sentence upon trial de novo would have. These briefs have been filed, and the Respondents have replied to them. From these filings, it is apparent to the Court that there are three essential issues which must be resolved in this case: 1) Did the imposition of a greater sentence upon trial de novo in the Superior Court of North Carolina deny the Petitioner due process of law and the right not to be placed in jeopardy twice for the same offense? 2) Did the subsequent indictment and conviction in the Superior Court of the State of North Carolina upon a felony, following conviction in the District Court of a misdemeanor on the identical set of facts, deny the Petitioner his constitutional right not to be placed in jeopardy twice for the same offense? If so, did Petitioner, by his plea of guilty in the Superior Court, waive his claim of double jeopardy? 3) Is Petitioner entitled to credit on his sentence for all time served in pre-trial custody?

Findings of Fact

The Petitioner herein, Jimmy Seth Perry, was arrested on charges of forgery and uttering forged instruments, and was tried at the August, 1968 term of the Wilson County Superior Court. At that term, he was charged under 10 separate bills of indictment with the felonies of forging and uttering a forged instrument. In two other bills of indictment, Perry was charged with the felony of obtaining property by means of false pretenses. The twelve bills of indictment were numbered consecutively with No. 2356 through 2367, inclusive. The solicitor elected to try the Petitioner on the bill of indictment no. 2360, which charged two counts–one for forging and the other for uttering a forged instrument. A verdict was not sought as to the forgery count, and the jury found Perry guilty on the uttering count after a plea of not guilty had been entered. Upon return of the verdict, Perry entered pleas of guilty to the uttering counts contained in each bill of indictment, with the State taking a nol. pros. to each forgery count, where applicable. Petitioner was given an active sentence of 5 to 7 years, from which he appealed. No error was found on appeal. *State v. Perry*, 3 N.C. App. 356 (1968).

Under the then applicable North Carolina law, the Petitioner received no credit for time spent in custody between May 28, 1968

until January 15, 1969, the date of certification of the decision of the North Carolina Court of Appeals. The Respondents have conceded that the Petitioner is entitled to credit for the time from August 28, 1968 until January 15, 1969, since that time was spent awaiting the outcome of his appeal, but deny that the Petitioner is entitled to any credit for time spent in custody prior to trial of his case.

On August 20, 1969, Petitioner received a six month sentence in the District Court for Northampton County, North Carolina, for the misdemeanor of assault with a deadly weapon. The sentence being consecutive with the sentence being served in the forgery and uttering case, the Petitioner appealed his conviction to the Superior Court, and sought a trial de novo. In the interim, the Petitioner was indicted for the felony of assault with a deadly weapon with intent to kill, resulting in serious bodily injury. He plead guilty to this offense in the Superior Court, and was sentenced on October 29, 1969 to serve 5 to 7 years in the State's Prison for this offense. This sentence was to run concurrently with the sentence being served in the uttering case, and under the applicable North Carolina law, commenced on October 29, 1969.

This sentence increased the amount of actual time that the Petitioner would have to spend in jail over the time he would have had to spend under the sentence of the District Court in one of two ways– 1) If the time for the beginning of sentence in the uttering case is taken to be May 28, 1969, as the Petitioner contends it should be, the Petitioner's minimum sentence would be 17 months and one day over the term imposed in the uttering case, and 11 months and one day over the six month sentence imposed by the District Court. 2) If the date of the beginning of the Petitioner's sentence in the uttering case is taken to be January 15, 1969, as it presently is, then the additional time served would be 9 months and 14 days, or 3 months and 14 days over the 6 month sentence imposed by the District Court.

The second offense actually occurred while Petitioner was incarcerated within the North Carolina Department of Corrections, and it is this conviction that the Petitioner is attacking on the basis of double jeopardy. It is the former sentence for which the Petitioner seeks credit for pre-trial custody.

Conclusions of Law

The Petitioner's first contention is that he was deprived of

due process of law, and was subjected to double jeopardy by the fact that he received a harsher sentence upon trial de novo in the Superior Court. This contention has been dealt with by the Supreme Court in the *Colton v. Kentucky* case, supra. In that case, the Supreme Court expressly upheld Kentucky's two tier system of justice, whereby a defendant receives a trial de novo upon appeal from a decision of the so-called inferior Court. The Kentucky system is very similar to the North Carolina system, wherein the defendant has an absolute right of appeal to the Superior Court, with a trial de novo, for minor offenses that he was convicted of in the District Court. The North Carolina system, in fact, was cited in the Colton case (See footnote 4, p. 591, *Colton v. Kentucky*, 32 L Ed 2d 584) so it is apparent that the two systems are very similar. Of course, the Supreme Court did not have the North Carolina system under consideration in the actual case before it, but the similarities between the two systems are so apparent that this Court is of the opinion that *Colton* controls in this case.

Petitioner also argues that the *Colton* case should not be applicable for two reasons: 1) The *Colton* case involved only the imposition of a fine, while the present case involves the imposition of a prison sentence, 2) The Kentucky system under attack provided for jury trial in the lowest Court, while the North Carolina system does not provide for trial by jury in the District Court. Trial by jury is only allowed when appeal is taken to the Superior Court. Thus, Petitioner argues, to allow for harsher sentence upon appeal to the Superior Court would impermissibly chill his right to trial by jury.

The Court is unpersuaded by the Petitioner's first argument, and feels that *Colton* has a wider breadth than the Petitioner would have the Court hold it to. The fact that Colton was fined by the lower Court, and then the fine was increased by the higher Court, would not limit the decision in *Colton* to those cases where only fines were imposed. Throughout the opinion, the Court stressed that the sentence which was imposed was harsher–not the fine. It was the system which was upheld–not the system at work through the actual case involved. *Colton* clearly allows harsher punishment when a trial de novo is held after appeal from the decision of the inferior Court without limitation as to when the punishment involved is in the form of imprisonment as opposed to a fine.

Petitioner's second argument is, likewise, without merit when applied to the system as a whole. The Supreme Court was advertent to the fact that in some of the two tier systems, including North

Carolina's, some of the procedural safeguards of more serious criminal prosecutions were lacking at the initial stages in the inferior Courts. See *Colton v. Kentucky*, supra, at p. 592-3. This Court cannot say that the fact that the Petitioner was not provided with a jury trial through the operation of the system until he appealed to the Superior Court chilled his right to trial by jury. The fact that the appeal is an absolute right insures that he is guaranteed his right to trial by jury, and there has been no showing that the fact that harsher punishment may result would in any way reduce or inhibit this right.

Thus, this Court holds that the North Carolina two tier system of prosecution for minor offenses falls within the rule in *Colton v. Kentucky*, supra, and does not violate due process merely because harsher punishment may be imposed upon trial de novo in the Superior Court after appeal from a decision of the District Court. Such a system, as a whole, is also constitutionally permissible from a double jeopardy standpoint.

In the present case, however, the Petitioner also attacks his conviction in the Superior Court from a double jeopardy standpoint on the basis that he was tried on a greater offense in the Superior Court. His claim is that, although it may be constitutionally permissible to try someone for the same offense in the higher Court upon appeal without violating the double jeopardy clause, it is clearly not permissible for a defendant to be tried for a greater offense in the higher Court, when the greater offense arises out of the identical fact situation as the lesser offense with which he was charged in the lower Court. Petitioner cites *Wood v. Ross*, 434 F. 2d 297 (4th Cir. 1970), as authority for this contention. The Respondents do not deny that there is dicta in the *Wood* case which supports the Petitioner's position, but deny that he is entitled to any relief since Petitioner plead guilty to the greater offense in the Superior Court, and thereby waived all non-jurisdictional defects in his case. *Vanater v. Boles*, 377 F. 2d 898 (4th Cir. 1967). Respondents further contend that a claim of double jeopardy is a non-jurisdictional defect, and cite several cases as authority for their position. *United States v. Hayland*, 264 F. 2d 346 (7th Cir. 1959); *Kissner v. United States*, 332 F. 2d 978 (8th Cir. 1964); *Cox v. Crouse*, 376 F. 2d 824 (10th Cir. 1967); *Western Laundry and Rental Co. v. United States*, (9th Cir. 1970). For reasons which will appear more fully herein, this Court is of the opinion that the Petitioner has stated a good cause in this matter, and that he is entitled to have his conviction on the greater offense expunged, and

a new trial ordered upon the offense with which he was charged in the lower Court.

Under the dictates of the Fifth Amendment to the Constitution of the United States, it is well settled that a person cannot be put in jeopardy more than once for the same offense. This provision has recently been applied to State Court prosecutions as well as Federal cases, ***Benton v. Maryland***, 395 U.S. 784, 23 L Ed 2d 707, 89 S.Ct. 2056 (1969), through the Fourteenth Amendment. Of course, it is apparent that there may be circumstances where a defendant is tried for two separate offenses by two different sovereigns, and that there is no problem of double jeopardy when a defendant is tried for a Federal offense and a State offense which arise out of the same factual context.

In the present case, the Court is faced with a unique situation. Here, there has been a trial on one offense in the District Court of the State of North Carolina, and a subsequent trial on a greater offense arising out of the same set of facts in the Superior Court of the State of North Carolina. The lesser offense is, in fact, an essential element of the greater offense; for here, the Petitioner was tried for assault with a deadly weapon in the lower Court (in violation of N.C.Gen.Stat. §14-33), and then was tried in the Superior Court for assault with a deadly weapon with intent to kill resulting in serious bodily harm (in violation of N.C.Gen.Stat. §14-32). Furthermore, Petitioner was tried on the felony charge only after he had exercised his absolute right to appeal to the Superior Court. What in effect has happened is that the Petitioner, when he exercised his right to appeal, was not only not provided with an appeal on the charge with which he was charged in the District Court, but was also subjected to prosecution on a felony charge with which he had never been charged in the District Court.

The Fourth Circuit Court of Appeals, in dealing with a similar contention as that put forth by this Petitioner, has clearly held that double jeopardy is involved when a defendant is subjected to prosecution for a greater offense upon trial de novo in a higher Court, after appeal from a lower Court. ***Wood v. Ross***, supra. In that opinion, the Court stated:

> "Our holding that the State cannot with due process punish Wood on appeal more heavily than he was originally charged, discloses too that he suffered double jeopardy. This is because the charge against him was increased after he had been tried for an offense

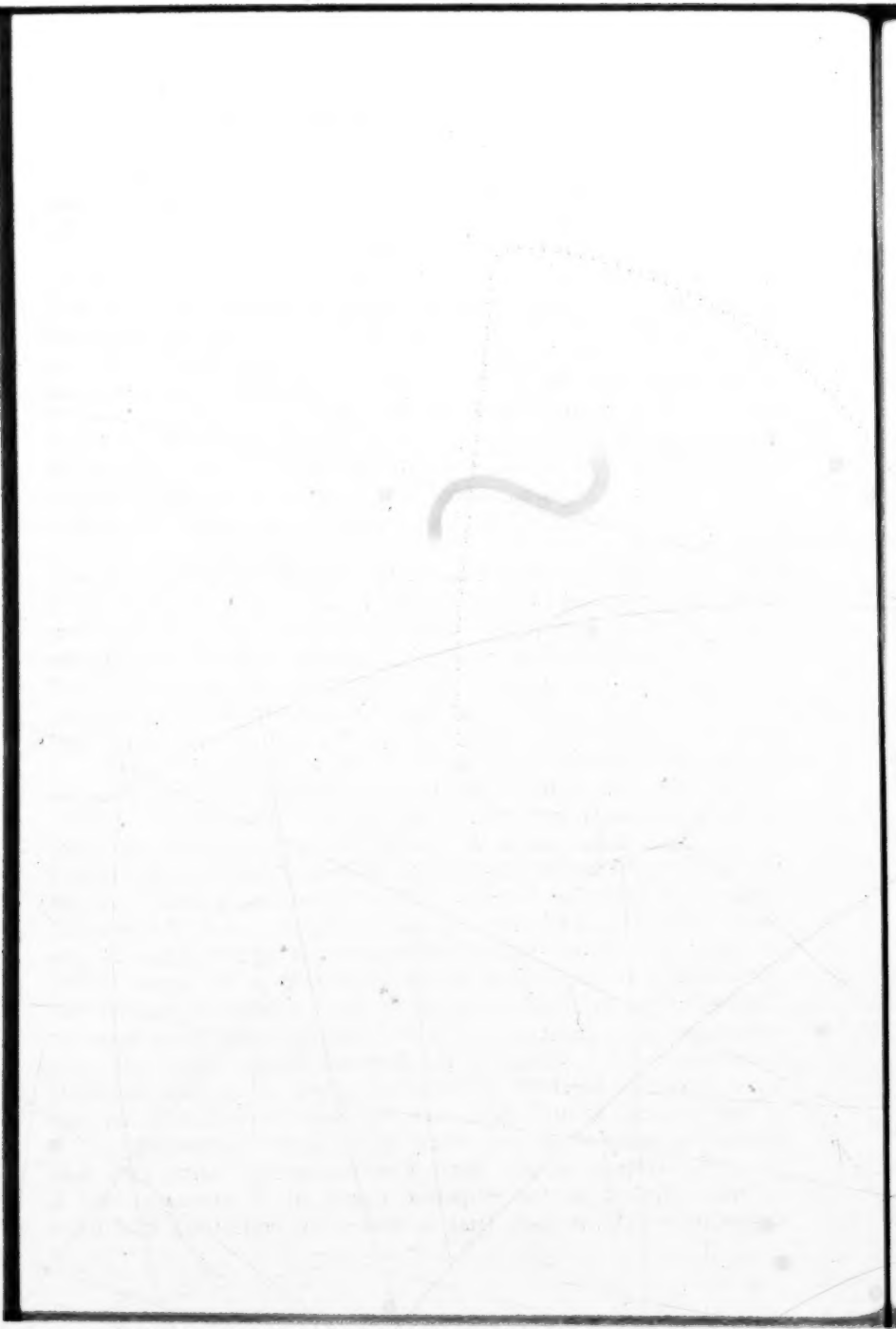
consisting of an essential element of the greater offense." 434 F. 2d at 299.

Similarly, the Supreme Court of the United States has held that double jeopardy is involved in a case where a defendant was tried in a municipal Court for violation of a municipal ordinance, and later charged in the Court of general jurisdiction with a felony arising out of the same incident. *Waller v. Florida*, 397 U.S. 387, 25 L Ed 2d 435, 90 S.Ct. 1184 (1970). The Court specifically rejected the State's argument that there was two separate offenses in the case since the Courts of the municipality were a separate jurisdiction from the Courts of the State. In the present case, it is apparent that the Courts involved are part of the integrated system of judicial recourse within the State of North Carolina. Any claim that the North Carolina District and Superior Courts are Courts of separate jurisdiction as State and Federal Courts would be entirely without merit.

Although it is clear that *Colton* allows the State to operate a two tier system of criminal justice, with trial de novo upon appeal from the lower Court, this Court cannot say that such a system is valid when the offense charged is not the same in both Courts. To allow the situation which has occurred in this case to be a part of such a system would be a gross miscarriage of justice. An absolute right of appeal is but a hollow phrase if a trial de novo is not held on the same offense as it was held on in the lower Court.

If the State were allowed to try a defendant on a misdemeanor in the lower Court, and then to try the same defendant for a felony in the higher Court when the lower Court conviction is contested, the result in the lower Court would be meaningless, and the District Court trial would be little more than a "proving ground" for the State's case. If a conviction can be secured on one of the essential elements of a felony in the lower Court, it would appear all the more simple to secure the felony conviction in the upper Court. The State has, in effect, a choice in these matters. It may try the defendant for a misdemeanor in the District Court, or it may try a defendant for a felony in the Superior Court. But it may not try a defendant for both offenses arising out of the same incident, in two separate Courts. Once there has been an election to try one offense as opposed to the other, that election is binding.

Futhermore, in the North Carolina system, where jury trial is only allowed in the Superior Court, it is apparent that a defendant's right to jury trial is chilled by permitting trial on a



felony charge in the Superior Court, after trial on a misdemeanor in the District Court. It is one thing to say that the possibility of imposition of a harsher sentence would not chill a defendant's right to a jury trial, but it is quite another to say that the possibility of being tried for a felony upon appeal of a misdemeanor conviction would not have such an effect. In this case, for example, the misdemeanor with which Perry was charged carried a maximum sentence of two years (N.C.Gen.Stat. §14-33), while the felony with which he was charged carried a maximum sentence of 10 years (N.C.Gen.Stat. §14-32). If Perry had been retried on the misdemeanor, the total additional sentence which he could have served over the sentence imposed by the lower Court would have been one and one-half years. The additional time which he could have served under the felony conviction would have been nine and one-half years.

This Court is of the opinion that *Colton* cannot be read to apply to the situation in the present case, and that the *Wood* case is controlling herein. The practice under attack here results in double jeopardy to the Petitioner, and chills his right to trial by jury.

Respondents argue that Petitioner has waived his right to claim double jeopardy by his plea of guilty to the indictment in the Superior Court. This Court is unpersuaded by such an argument. In the *Wood* case, Petitioner had also plead guilty to the greater offense in the Superior Court, and double jeopardy was still held to apply. Furthermore, this Court is of the opinion that double jeopardy is the type of fundamental right (See *Benton v. Maryland*, supra) which cannot be waived by mere silence in the record. It goes to the power of a Court to try a person (See *Waller v. Florida*, supra.)

In summary, this Court finds that it is not constitutionally permissible for a State to try a defendant for a greater offense in a trial de novo after an appeal is taken within a two tier system of criminal justice, when the greater offense has as one of its essential elements the offense for which the defendant was tried in a lower Court.

Petitioner's third claim, that he has been deprived of credit for time spent in custody prior to trial, and while awaiting appeal, is also a sound claim. This Court has held, in a long line of decisions, that credit for pre-trial and appeals custody is required. See *Sellers v. Blackledge*, No. 2961-Raleigh (E.D.N.C., May 3, 1972)

NOW, THEREFORE, in accordance with the foregoing, it is

ORDERED, that the sentence imposed by the Superior Court

in this case for the felony of assault with a deadly weapon with intent to kill resulting in serious bodily harm on October 29, 1969 be, and the same is hereby, VACATED. Since the only valid sentence which has been imposed in this aspect of the Petitioner's complaint is the six month sentence imposed by the District Court on August 20, 1969, and since the Petitioner has appealed from that sentence, it is

FURTHER ORDERED, that the State shall provide the Petitioner an opportunity to appeal his misdemeanor conviction to the Superior Court, if he desires to do so, and

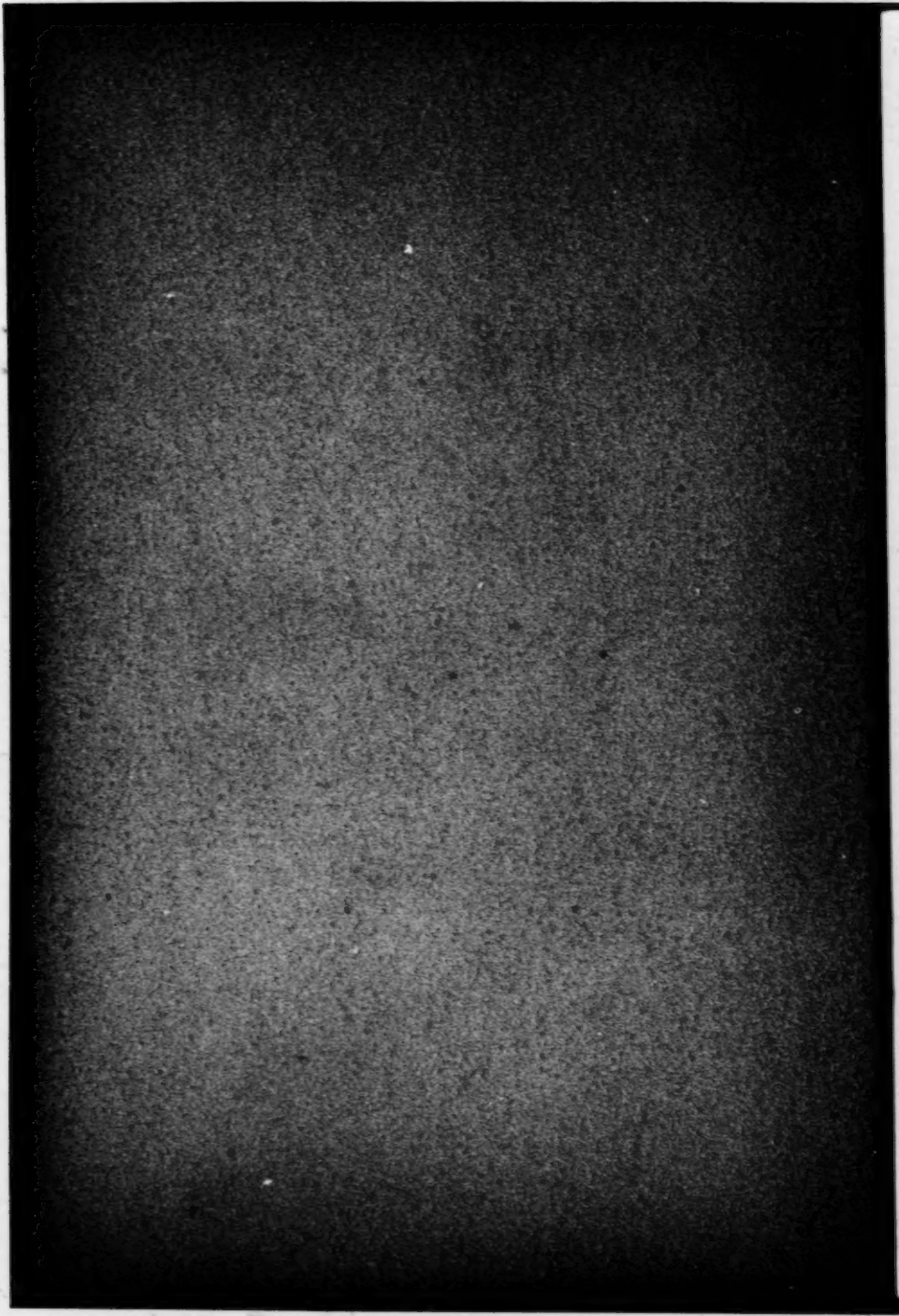
FURTHER ORDERED, that the Petitioner be given credit on his sentence being served under the forgery and uttering conviction for all time spent in custody from May 28, 1968 until January 15, 1969. The State of North Carolina shall file in the office of the Clerk of this Court in Raleigh, North Carolina, within 30 days from date of service of this ORDER, a statement certifying whether or not the Petitioner has been credited with such time in accordance with this ORDER. The State shall also serve a copy of this certificate by mail upon the Petitioner, and

FURTHER ORDERED, that the Clerk shall serve copies of this ORDER upon Jimmy Seth Perry, 835 West Morgan St., Raleigh, North Carolina, and upon Richard N. League, Assistant Attorney General, P.O. Box 629, Raleigh, North Carolina; and upon James Keenan, Attorney at Law, Durham, North Carolina.

Let this ORDER be entered forthwith.

s/ John D. Larkins, Jr.
United States District Judge

Trenton, North Carolina
August *23rd*, 1972



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1660

STANLEY BLACKLEDGE, Warden,
Central Prison, Raleigh, N.C. and
STATE OF NORTH CAROLINA,

Petitioners,

v.

JIMMY SETH PERRY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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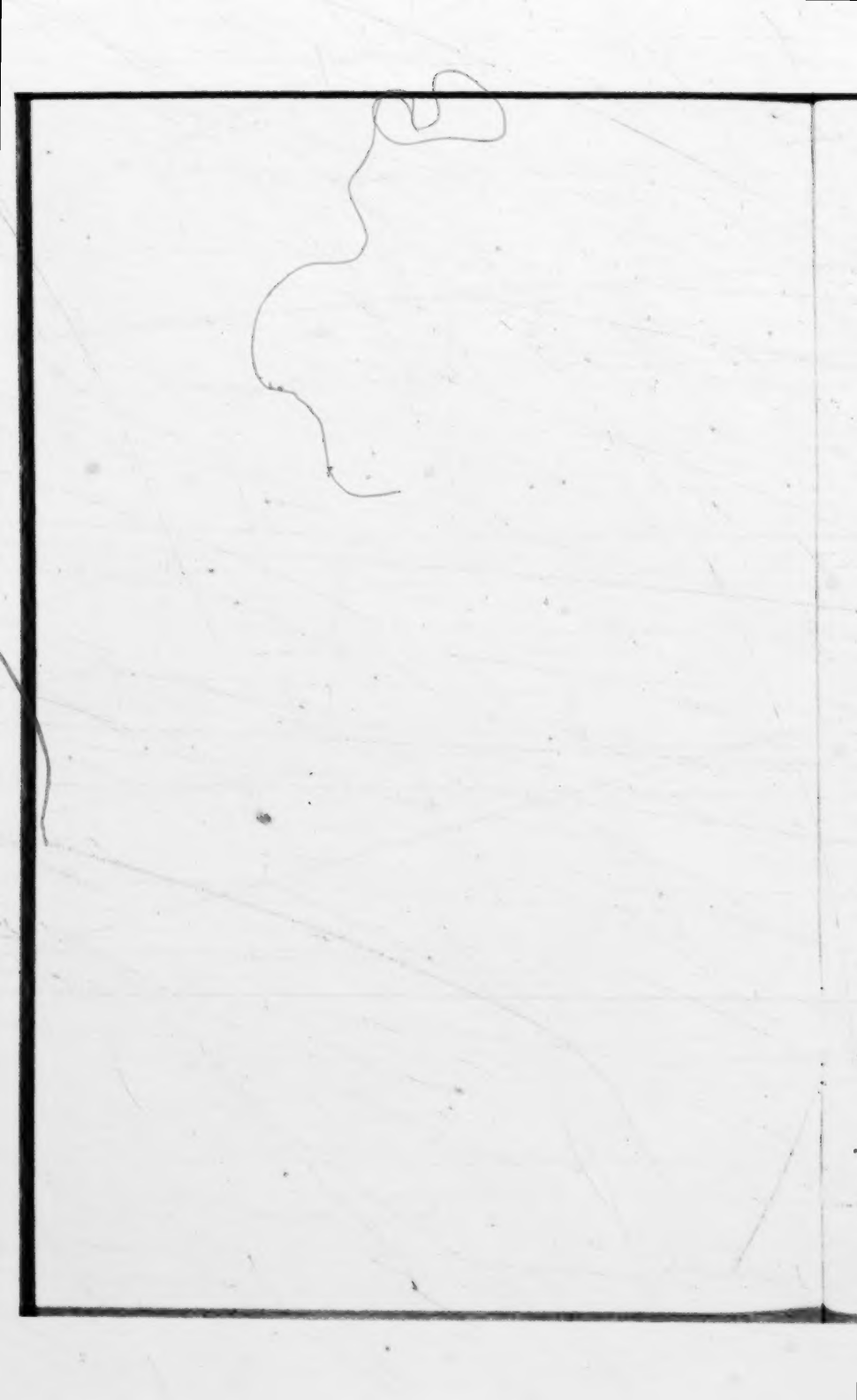

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit filed April 10, 1973, is not reported, and is printed as Appendix A in the petition for certiorari.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Are former jeopardy and an unconstitutional "chilling effect" non-jurisdictional defenses which are waived by a voluntary and intelligent plea of guilty?

II. Must a defendant be specifically advised that a guilty plea waives his right to contest double jeopardy and must this appear of record?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article V:

"No person ... shall ... be subject for the same offense to be twice put in jeopardy of life and limb."

U.S. Constitution, Article XIV:

"No State ... shall ... deprive any person of life, liberty or property, without due process of law."

N.C.G.S. 15-177:

Appeal from justice, trial de novo.—The accused may appeal from the sentence of the justice to the superior court of the county. On such appeal being prayed, the justice shall recognize both the prosecutor and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as aforesaid. In all cases of appeal, the trial shall be anew, without prejudice from the former proceedings.

N.C.G.S. 15-177.1:

Appeal from justice of the peace or inferior court; trial anew or de novo.—In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior court, the defendant shall

be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon.

STATEMENT OF THE CASE

In August 1969, Jimmy Seth Perry was convicted in the District Court of Northampton County, North Carolina, on a warrant charging him with the misdemeanor of assault with a deadly weapon. He received a sentence of six months imprisonment. This was to be served after a sentence of 5 to 7 years for uttering a forged instrument which had been imposed in August of 1968 in a different court; and which sentence actually began in January 1969. Perry appealed the assault conviction to the Superior Court and received a trial *de novo*. However, during the interim between appeal and trial *de novo*, the solicitor obtained an indictment charging him with a higher and felonious degree of the crime and it was this on which he was tried rather than the warrant. In October 1969, he pleaded guilty and received 5 to 7 years to be served concurrently. The transcript of plea is Appendix B in the petition for certiorari. As the uttering sentence began January 15, 1969, and this assault sentence began on October 29, this was, in effect, an additional sentence of about 9 months and 14 days or about 3 months and 14 days over the sentence of six months given for assault in the District Court.[1]

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[1] The District Court noted that the sentence could be viewed as giving an additional term of about 17 months since under North Carolina law at that time petitioner received no credit for pretrial custody on, or custody pending appeal of his uttering conviction. This was later required as a matter of constitutional law by the Fourth Circuit as to appeal custody time, *Cole v. North Carolina*, 419 F.2d 127 (4th Cir. 1969), based on *North Carolina v. Pearce*, 395 U.S. 711 (1969); and subsequent District Court decisions in North Carolina applied this to pretrial custody, which the 4th Cir-

Petitioner, after exhausting state remedies, filed for a writ of habeas corpus which was allowed by Honorable John D. Larkins, Judge, United States District Court, Eastern District of North Carolina. The decision of Judge Larkins is attached as Appendix C [to the petition for certiorari]. He found that the indictment of petitioner for the higher offense pending trial *de novo* was double jeopardy, relying on *Wood v. Ross*, 434 F.2d 297 (4th Cir. 1970); that the first trial constituting a binding election and the second a chilling of the right to appeal; and that double jeopardy could not be waived, it going to the power to retry Perry. On appeal this was affirmed by the United States Court of Appeals for the Fourth Circuit without discussion.

ARGUMENT

I.

FORMER JEOPARDY IS A DEFENSE WHICH IS WAIVED BY A VALID PLEA OF GUILTY. THE SAME IS TRUE OF A DUE PROCESS CLAUSE VIOLATION WHICH ARISES BECAUSE OF A CHILLING EFFECT ON THE RIGHT TO TRIAL BY JURY.

In this case, Jimmy Seth Perry entered a plea of guilty in the Superior Court to assault with a deadly weapon with intent to kill resulting in serious bodily injury, a felony. This plea occurred at a trial *de novo* on the assault after Perry had first been tried and convicted in the state District Court of a misdemeanor assault encompassed by the felony charge. The United States District Court held that this entitled him to relief because it unconstitutionally burdened his right to a jury trial, and because it was double jeopardy (Pet. Cert. pp. 12-20). This was incorrect because the legal effect of the plea was

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cuit ultimately endorsed, *Ham v. North Carolina*, 471 F.2d 406 (4th Cir. 1973). He received this additional credit on his uttering charge by virtue of the order of this case, thereby advancing his sentence beginning date on the uttering conviction so as to create this 17 month interim.

to make the conviction binding upon him and to preclude a constitutional attack on the conviction unless the plea was coerced by illegality to the extent that his will was overborne, or unless the plea was entered because of incompetent advice by his counsel, *McMann v. Richardson*, 397 U.S. 759 (1970). Neither Perry nor his counsel alleged either of these in seeking his release by way of *habeas corpus*, but instead alleged independent constitutional violations without attacking the plea itself.

A violation of the right against double jeopardy is not excepted from the *McMann* holding. When such a violation occurs, it can be used by an accused as a basis for "a plea of discharge or release that gives a reason why an accused ought not answer to the indictment and ought not be put on trial for the crime alleged", 22 C.J.S. p. 1241. Therefore, it is similar to a motion to quash because of racial discrimination in the jury, a matter which is waived by a valid guilty plea, *Tollett v. Henderson*, 411 U.S. 258 (1973); it is similar to a motion to quash for lack of a speedy trial, also a waivable matter, *Fowler v. United States*, 391 F.2d 276 (5th Cir. 1968); *United States v. Doyle*, 348 F.2d 715 (2d Cir. 1965); and it is similar to a statute of limitations, also waivable, *Forthoffer v. Swope*, 103 F.2d 707 (9th Cir. 1938). As is the case with a violation of these rights, and all other constitutional and nonconstitutional rights, a double jeopardy violation may or may not be oppressive; it may or may not adversely affect the fact-finding process; it may or may not figure in the decision to plead guilty. Similarly, its waiver rests on the same basis as a waiver of all other constitutional rights, *i.e.*, a feeling that the likely results of a contest concerning it will not justify the effort, *McMann v. Richardson, supra*. For these reasons, a defense of double jeopardy is properly held to be waived by a guilty plea.

The leading case on this point is *Brady v. United States*, 24 F.2d 399 (8th Cir. 1928) in which the Court held:

> "The constitutional immunity from second jeopardy is a personal privilege which the accused may waive. (16 case cites omitted). The waiver may be express or implied (4 case cites omitted). Ordinarily the defense must be pleaded specially (5 case cites omitted). Waiver will be implied where the accused pleads not guilty and proceeds to trial, verdict and judgment without raising the defense of former jeopardy (16 case cites omitted). The defense cannot be raised for the first time by motion in arrest of judgment or by motion for a new trial or on appeal (13 case cites omitted)." p. 405.

In accord, *United States v. Hoyland*, 264 F.2d 346 (7th Cir. 1959); *Smith v. United States*, 359 F.2d 481 (8th Cir. 1966); *Kistner v. United States*, 332 F.2d 978 (8th Cir. 1964); *Harris v. United States*, 237 F.2d 274 (8th Cir. 1956); *Berg v. United States*, 176 F.2d 122 (9th Cir. 1949); *Cox v. Kansas*, 456 F.2d 1279 (10th Cir. 1972); *Cox v. Crouse*, 376 F.2d 824 (10th Cir. 1967); *Cabalero v. Hudspeth*, 144 F.2d 545 (10th Cir. 1940); *Curtis v. United States*, 67 F.2d 943 (10th Cir. 1933).

A violation of the right to due process occurring because of a "chilling effect" on the right to trial by a jury is similarly not excepted from the *McMann* holding, *Brady v. United States*, 397 U.S. 743 (1970), *North Carolina v. Alford*, 400 U.S. 25 (1970), *Parker v. North Carolina*, 397 U.S. 790 (1970). Accordingly, the decision below should be reversed.

II.

A VALID WAIVER OF DOUBLE JEOPARDY IS INFERRED DESPITE THE SILENCE OF THE RECORD AS TO IT, PROVIDED THE RECORD MEETS THE STANDARD SET OUT IN *BOYKIN v. ALABAMA*, 395 U.S. 238 (1969)

In deciding that Perry was entitled to relief, the United States District Court held alternatively that the waivable right against double jeopardy "is the type of fundamental right which cannot be waived by mere silence in the record. It goes to the power of the court to try a person". Because nothing appeared in the record on this particular matter, the court held for this reason also that double jeopardy could not be waived. This is incorrect for the constitutional requirement in this regard is not that a particular matter be discussed of record, but only that the record show that an accused has an understanding of what the plea connotes and of its consequences, *Boykin v. Alabama*, 395 U.S. 238 (1969). However, this does not require that he have an understanding of every right waived, *Tollett v. Henderson, supra*; or an understanding of every consequence of his plea, *Redwine v. Zuckert*, 317 F.2d 336 (D.C. Cir. 1963), *Morales - Guarjardo v. United States*, 440 F.2d 775 (5th Cir. 1971), and therefore it should not be required that the record reveal that every right or consequence was explained to him in order to meet the *Boykin* standard.

The transcript of Perry's sworn statements taken prior to the acceptance of his plea (Pet. Cert. pp. 9-10) shows that the requirements of the *Boykin* case were met at Perry's trial. Under oath, he stated he was able to hear and understand the trial judge and was not under the influence of alcohol or drugs. He swore he understood the charge, that it had been explained to him; that he had conferred with his lawyer; that he was ready for trial; and had had time to subpoena his witnesses. He further stated

he knew he could plead not guilty and be tried by a jury, but that he was in fact guilty. Therefore, he pleaded guilty and "freely, understandingly, and voluntarily" instructed his lawyer to plead guilty. He stated that he understood he could be sentenced to as much as 10 years imprisonment. He also testified he was satisfied with his lawyer's services; no one had made any promise or threat to induce his plea; and no one had violated his constitutional rights.

In the event that *Boykin* requirements were not met by the above examination of Perry, however, this did not automatically entitle him to have his sentence vacated because of an alleged violation of a constitutional right. He was still required to prove that his plea was void because it was not in accordance with the *McMann* requirements, *i.e.*, that his plea was not an act "done with sufficient awareness of the relevant circumstances and likely consequences", *Brady v. United States*, 397 U.S. 743 (1970).

Lastly, since the validity of petitioner's plea was not challenged, the *Boykin* requirements are probably not even applicable. Generally, it is held that a defense of double jeopardy must be pleaded, *i.e.*, it is up to the accused to put something in the record concerning it if he desires to preserve the matter for review. Generally, this should be done before a plea to the issue of guilt or innocence, 22 C.J.S. 1242, FRCrP 12(b). This has been described as appropriate by this Honorable Court, *United States v. Murdoch*, 284 U.S. 141 (1931), and is the rule in North Carolina, *State v. Baldwin*, 226 N.C. 295 (1945). For this reason, in addition to the numerous cases previously cited holding that a guilty plea waives a violation of the double jeopardy clause, many cases hold that the defense is waived if not raised during trial, even if the plea is not guilty. *Grogan v. United States*, 394 F.2d 287 (5th Cir. 1967); *United States v. Buonomo*, 441 F.2d 922 (8th Cir. 1971); *Ferini v. United States*, 340

F.2d 837 (8th Cir. 1965); *Brady v. United States*, 24 F.2d 399 (8th Cir. 1928); *Haddad v. United States*, 349 F.2d 511 (9th Cir. 1965); *Levin v. United States*, 5 F.2d 598 (9th Cir. 1925); *Morlan v. United States*, 230 F.2d 30 (10th Cir. 1956); *McKinley v. Hudspeth*, 120 F.2d 523 (10th Cir. 1941); *Curtis v. United States*, 67 F.2d 943 (10th Cir. 1933); *United States v. Scott*, 464 F.2d 832 (D.C. Cir. 1972). As stated in *Haddad v. United States, supra*, at page 514:

> "Formerly, double jeopardy was raised by the plea of autrefois acquit or autrefois convict. Such special pleas have been abolished by Rule 12 of the Federal Rules of Criminal Procedure, but that rule also provides that any defense capable of determination without trial of the general issue may be raised before trial by motion, and that the failure to present it constitutes a waiver of it. The court however may grant relief for cause shown. Not only was there no such motion, but there was no request for relief. *Levin v. United States*, 9th Cir. 1925, 5 F.2d 598, 600 is authority for the proposition that failure to plead former jeopardy constitutes a waiver. The same rule has been applied since the adoption of the Federal Rules of Criminal Procedure, *Harris v. United States*, 8th Cir. 1956, 237 F.2d 274."

Accordingly, nothing else appearing, silence of the record does operate as the waiver of any defense of former jeopardy; and the decision below should be reversed.

CONCLUSION

For the reasons above, the judgments below should be set aside and the case remanded for a dismissal of the claims adjudicated by the courts below, and this is the relief prayed for.

This 28th day of November, 1973.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief for Petitioners by placing three copies in the United States Mail at Raleigh, North Carolina, postage prepaid, addressed to James Keenan of the firm of Keenan, Paul and Rowan at 811 West Main Street in Durham, North Carolina, on the 28th day of November, 1973.

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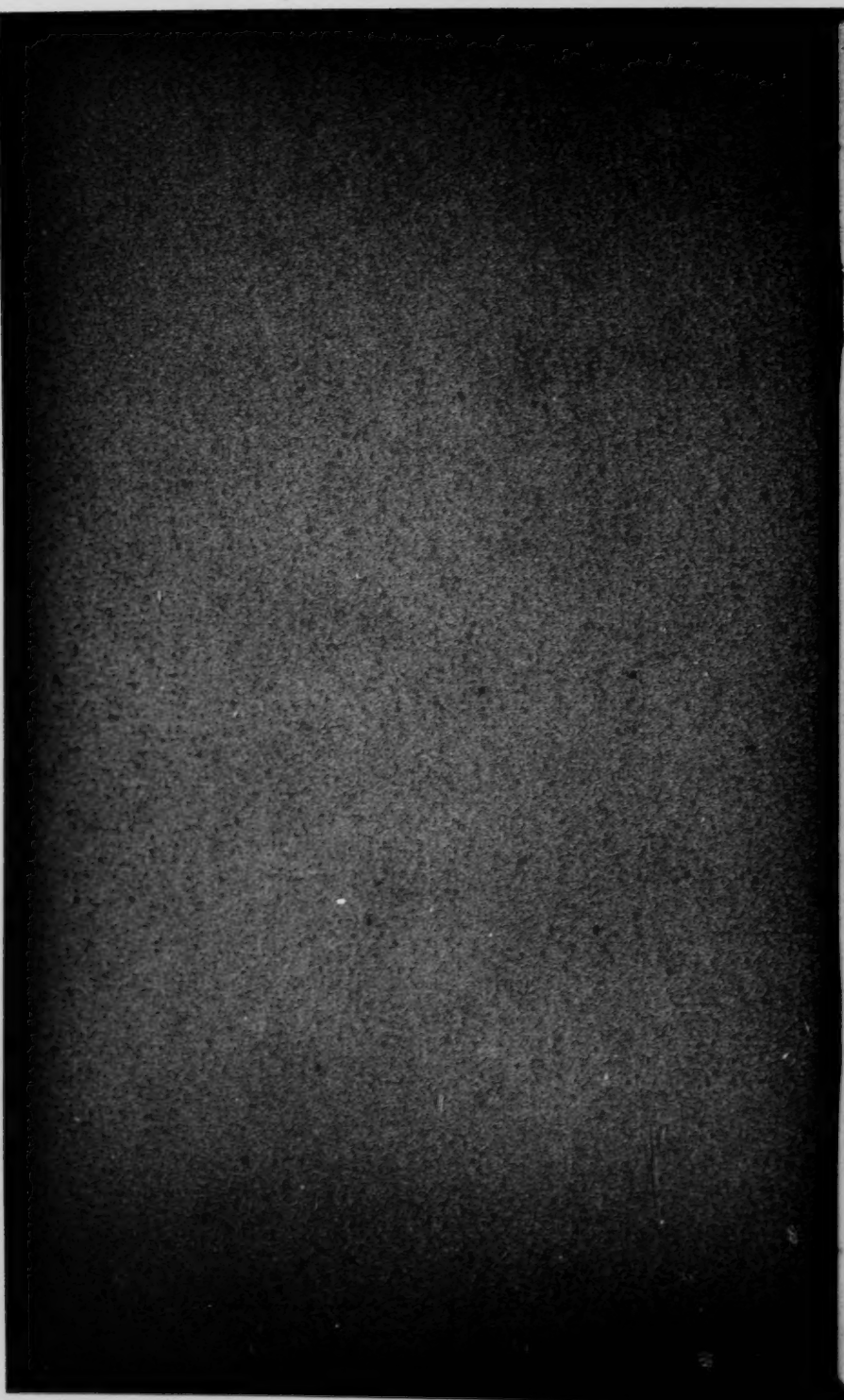

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1660

STANLEY BLACKLEDGE, WARDEN,
CENTRAL PRISON, RALEIGH, N.C.
AND STATE OF NORTH CAROLINA,

Petitioners,

v.

JIMMY SETH PERRY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the indictment and conviction of respondent at a de novo trial of a more aggravated form of assault than that which he was convicted of in an inferior Court violates the double jeopardy guarantees of the Fifth Amendment as made binding on the states by the Fourteenth Amendment.

2. Whether the enhancement of an assault charge from a misdemeanor to a felony at a de novo trial and the restriction of the right to a trial by jury denied respondent due process of law.

3. Whether respondent invariably forfeits or waives claims of double jeopardy and denial of due process of law by a plea of guilty.

4. Whether *Boykin v. Alabama*, 395 U.S. 238 (1969), requires a full statement to a defendant of the rights waived or forfeited by the plea of guilty, and if so, what is the effect of the failure to caution respondent that his plea of guilty could constitute waiver or forfeiture of claims of double jeopardy and denial of due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V

"No person shall be . . . subject for the same offense to be put twice in jeopardy of life or limb. . . ."

U.S. Constitution, Amendment VI

"In all prosecutions, the accused shall enjoy the right to . . . a trial by an impartial jury. . . ."

U.S. Constitution, Amendment XIV

"No State . . . shall . . . deprive any person of life, liberty or property, without due process of law."

North Carolina G.S. 7A-272

". . . [T]he district court has exclusive, orginal jurisdiction for the trial of criminal actions . . . below the grade of felony, and the same are hereby declared to be petty misdemeanors."

North Carolina G.S. 7A-196(b)

"In criminal cases there shall be no jury trials in the district court. Upon appeal to Superior Court trial shall be de novo, with jury trial as provided by law."

North Carolina G.S. 7A-290

"Any defendant convicted in district court may appeal to the Superior Court for trial de novo. . . ."

North Carolina G.S. 15-177.1

"In all cases of appeal to the Superior Court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon."

North Carolina G.S. 14-32(a) (1969)

"Any person who assaults another person with a firearm or other deadly weapon of any kind with intent to kill and inflicts serious injury is guilty of a felony punishable under G.S. 14-2."

North Carolina G.S. 14-2

"Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding ten years, or by both, in the discretion of the court."

North Carolina G.S. 14-33 (1969)

(b) ". . . A person commits an aggravated assault . . . if in the course of such assault . . . he:

(1) Uses a deadly weapon. . . ."

(c) ". . . Any . . . aggravated assault . . . is punishable by a fine in the discretion of the court,

imprisonment not to exceed two (2) years, or both such fine and imprisonment."

STATEMENT OF THE CASE

Jimmy Seth Perry was convicted in August, 1968 in the Wilson County Superior Court of numerous counts of uttering a forged instrument and obtaining property by false pretense. He received an active prison sentence of 5 to 7 years from which he appealed. On appeal the conviction was affirmed by the North Carolina Court of Appeals. *State v. Perry*, 3 N.C. App. 356, 164 S.E.2d 629 (1968).

While in confinement Perry was involved in an altercation that led to the issuance of a warrant originally charging misdemeanor assault. On August 20, 1969, he was brought to trial in the District Court of Northhampton County. The minutes of the proceedings on that date show that the prosecutor moved to amend the warrant to charge felonious assault and that the motion was allowed. However, the warrant was amended again to charge misdemeanor assault to which Perry entered a plea of not guilty and following trial before the Court without a jury was convicted and given a six month sentence.[1] The sentence imposed, being consecutive with the sentence under service, respondent appealed his conviction to the Northhampton County Superior Court where, in accordance with North Carolina law, his earlier conviction and sentence were nullified and he was tried de

[1] N.C. Gen. Stat. §7A-272 confers exclusive original jurisdiction in the District Court Division of the General Court of Justice for the trial of misdemeanors.

novo.[2] In the interim prior to his appearance in Superior Court, Perry was indicted by the grand jury for the felony of assault with a deadly weapon with intent to kill inflicting serious bodily injury. The indictment covered the same alleged acts for which Perry had been tried and convicted of a misdemeanor in District Court.[3] On October 29, 1969 Perry entered a plea of guilty as charged to the bill of indictment and was sentenced to 5 to 7 years in the State's Prison to be served concurrently with the sentence then being served as a result of the convictions in Wilson County. Under applicable North Carolina law this latter sentence commenced as of October 29, 1969.[4]

Perry filed a *pro se* application for a writ of habeas corpus under 28 U.S.C. §2254 alleging his constitutional rights had been violated. The District Court first dismissed the petition for failure to exhaust available state remedies. However, the Court of Appeals for the Fourth

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[2] N.C. Gen. Stat. §§7A-290, 15-177.1.

[3] Under the assault statutes of North Carolina, the misdemeanor of assault with a deadly weapon is a lesser included offense of the felony of assault with a deadly weapon with intent to kill inflicting serious bodily injury. *State v. Weaver*, 264 N.C. 684, 142 S.E.2d 633 (1965); *State v. Burris*, 3 N.C. App. 35, 164 S.E.2d 52 (1968). One can be convicted of the lesser offense on an indictment charging the greater felony offense. *Id.*

[4] Respondent contended successfully in the District Court that he was entitled to full credit for time served in confinement between his arrest on May 28, 1968 on the original charge and the date of certification of the opinion of the Court of Appeals, January 15, 1969. The validity of this holding is unchallenged by the petitioners. Thus, the net effort of the 5 to 7 year sentence for felonious assault was to increase the minimum period of confinement by 17 months and one day, and to increase the sentence received in the District Court by 11 months and one day.

Circuit reversed holding that resort to the Courts of North Carolina would be futile in that the Supreme Court of North Carolina had consistently denied the constitutional claims presented by Perry in his petition.[5]

The District Court on remand found a violation of Perry's rights not to twice be placed in jeopardy for the same offense and further held that this right had not been waived by the plea of guilty in Superior Court. The District Court likewise awarded respondent credit for time spent in custody prior to trial and while awaiting appeal. The Fourth Circuit affirmed.[6]

SUMMARY OF ARGUMENT

The constitutional right of the fifth amendment to not be twice placed in jeopardy for the same offense as made binding on the states by the fourteenth amendment was violated when the State of North Carolina placed Jimmy Seth Perry on trial for felonious assault following an appeal for trial de novo from a conviction in an inferior court of a lesser included offense of misdemeanor assault. The State was free following the appeal to retry Perry for the same offense. The State was not free, however, to retry him on an indictment charging him with a greater degree of the same crime arising out of the same transaction, for his double jeopardy bar to a subsequent prosecution of the felony was unaffected by his appeal

[5] 453 F.2d 856 (4th Cir. 1971). The Court of Appeals further instructed that District Court action await the ruling of this Court in *North Carolina v. Rice*, 434 F.2d 297 (4th Cir. 1970), vacated and remanded, 404 U.S. 244 (1971).

[6] The Fourth Circuit in a three sentence opinion cited only *Ham v. State of North Carolina*, 471 F.2d 406 (4th Cir. 1973) as authority. *Ham* dealt with the issue of credit for pre-trial confinement, an issue no longer pursued in this litigation.

from his conviction for the misdemeanor. The State is bound to bring all of its greater or lesser included charges arising out of one criminal transaction in one prosecution.

The charge of a felony following the giving of notice of appeal for trial de novo likewise violated due process. The State is without power to put a price on appeal. The exercise of that right must be free and unfettered. A prosecutor cannot "punish" a defendant for exercising his right to seek a trial de novo from a misdemeanor conviction by elevating the pending charge to the felony level. If certain conduct mandates criminal charges at the felony level there is no plausible reason why those charged with that determination are unable to make it in the first instance. The conclusion is inescapable that Perry was subjected to felony charges because he sought to exercise his right to appeal for trial de novo.

Also, Perry was denied due process of law in that his right to trial by jury was restricted. Perry was charged with an offense which carried a potential sentence of two years imprisonment, and as such had an absolute right to trial by jury. He was clearly denied that right when forced to submit to trial in District Court without the right to have his guilt or innocence determined by a jury. The fact that he was free thereafter to secure a jury trial by an appeal for trial de novo does not alleviate the constitutional violation. A constitutional right cannot be deferred on a theory that it will be available at a subsequent de novo proceeding. Second, the price attached to the right to trial by jury is the threat of an unexplained harsher charge and sentence which must inevitably unconstitutionally deter the exercise of that right.

Perry did not surrender or waive the right to present his constitutional claims by his plea of guilty to the felony charge at the de novo trial. The claims of double jeopardy and due process presented by this case go to the right of the State to place Perry on trial at all and not to the question of guilt or innocence. A plea of guilty can properly be held to surrender a guilt related constitutional claim; however system related claims are not surrendered by the guilty plea unless the record discloses a deliberate bypass of state remedies and/or a knowing and intelligent waiver of the constitutional claim involved.

Finally, Perry should have been cautioned at the time of his guilty plea precisely what constitutional claims he waived by such a plea. Failure to caution Perry of the effect of his plea should require determination on the merits of the double jeopardy and due process arguments.

ARGUMENT

I.

THE STATE OF NORTH CAROLINA VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT, MADE APPLICABLE TO THE STATES IN *BENTON V. MARYLAND*, 395 U.S. 784, BY CONVICTING RESPONDENT PERRY ON TRIAL DE NOVO OF A GREATER DEGREE OF THE OFFENSE OF WHICH HE HAD BEEN PREVIOUSLY CONVICTED IN THE INFERIOR COURT.

> The plea of *auterfoits convict*, or a former conviction for the same identical crime, though no judgment was ever given. . . . is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the

> same crime. Hereupon it has been held that *a conviction of manslaughter,* on an appeal, *is a bar even in another appeal,* and *much more in an indictment, of murder;* for the fact prosecuted is the same in both, though the offenses differ in coloring and in degree. (emphasis supplied.) Blackstone, *Commentaries* Book IV, p. 330 (1772 Ed.)

From the time of Blackstone, the common law plea of *autrefois convict* has been held to bar a subsequent prosecution of a *higher* degree of the same offense of which the defendant was previously convicted, as well as to bar a subsequent prosecution for the same *degree* of the offense. The double jeopardy clause of the Fifth Amendment made the prior conviction bar a constitutional guarantee, *Ex parte Lange,* 85 U.S. (18 Wall.) 163 (1873), and the federal courts have consistently held that the rule barring reconviction of the same offense bars a subsequent prosecution for a greater degree of the same crime. *Gavieres v. United States,* 220 U.S. 338 (1911); *Ex parte Nielsen,* 131 U.S. 176 (1889). In *Benton v. Maryland,* 395 U.S. 784 (1969), this Court held the states bound by these constitutional privileges.

The federal test for determining if the higher offense charged in the second indictment is the "same crime" for purposes of the prior convictions bar was originally borrowed from the test enunciated in the 1871 Massachusetts decision of *Morey v. Commonwealth,* 108 Mass. 433 (1871). That test provided that a conviction or acquittal upon one indictment is a bar to a subsequent conviction and sentence upon another if the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The *Morey* test was cited and adopted in the *Nielsen* and *Gavieres* decisions, *supra.* More recently, the

federal standard governing prior convictions for the same crime has been known as the "Blockburger Rule" after *Blockburger v. United States,* 284 U.S. 299 (1932). The "Blockburger Rule" has been recognized as providing that "a prosecution for a minor offense included in a greater will bar a prosecution for the greater, if on an indictment for the greater the accused can be convicted of the lesser." *Giles v. United States,* 157 F.2d 588, 590 (9th Cir. 1946).[7]

This standard applies exactly to the varying degrees of the North Carolina assault statutes and requires that conviction of the lesser degree of the offense be a barrier to a subsequent prosecution for the greater degree. Perry was first convicted of the general misdemeanor of assault with a deadly weapon, N.C.G.S. §14-33(b)(1) (1969). Such a conviction, under the federal rules, bars a second conviction under the same statute for the felony of assault with a deadly weapon with intent to kill inflicting serious bodily injury, N.C.G.S. §14-32(a) (1969). The sole distinction between the misdemeanor and felony degrees of assault charged is that the latter requires proof of the additional elements of "with intent to kill" and "resulting in serious bodily injury." The misdemeanor is therefore considered "a less degree of the same crime,"

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[7]The common law has long recognized that a person convicted or acquitted of a minor offense cannot be charged again in a more aggravated form—the 'ascending scale principle'. See *Miles* (1890), 24 Q.B.D. 423, 431 (Hawkins, J.).

> Where a criminal charge has been adjudicated upon . . . that adjudication, whether it takes the form of an acquital or conviction, . . . may be pleaded in bar to any subsequent prosecution for the same offense, whether with or without circumstances of aggravation.

See also, Friedland, *Double Jeopardy*, pp. 106-107 (1969).

an included offense of the felony. *State v. Weaver,* 264 N.C. 681, 683, 142 S.E.2d 633, 635 (1965); *see also, State v. Burris,* 3 N.C. App. 35, 164 S.E.2d 52 (1968). Conviction of the higher crime, then, would necessarily include all the elements of the lesser degree, and subsequent prosecution for the higher would be barred by the prior conviction for the included crime.

The rule that a defendant may not be prosecuted again for the crime for which he has been previously convicted is subject, of course, to the well established principle of *United States v. Ball,* 163 U.S. 662 (1896), that a defendant who has been successful in setting aside a prior conviction may be retried for the same offense for which he was formerly convicted. *United States v. Ewell,* 383 U.S. 116 (1966); *United States v. Tateo,* 377 U.S. 463, 465, 473-474 (1964). This principle is often justified by the theory that a defendant who appeals a conviction continues in jeopardy *of that conviction* throughout the appellate process and the new trial. *Green v. United States,* 355 U.S. 184, 193 (1957); *Kepner v. United States,* 195 U.S. 100, 134 (1904) (Holmes, J. dissenting).

Thus the State was free, following Perry's appeal from his conviction of the misdemeanor offense, to retry him on the *same charge* on which he had been previously convicted. The State was not free, however, to retry Perry on an indictment charging him with greater degree of the same crime arising out of the same transactions, for this double jeopardy bar to a subsequent prosecution of the felony was unaffected by his appeal from his conviction for the misdemeanor. This is the teaching of *Green v. United States, supra* and *Price v. Georgia,* 398 U.S. 323 (1970). These cases established the principle that a defendant who appeals from a conviction of a lesser included offense does not yield his double jeopardy

bar to a subsequent prosecution for the greater offense arising out of the same transaction. In *Green* the jury at the first trial was charged that they could find the accused guilty of first degree murder, second degree murder or arson. The jury found Green guilty of arson and of second degree murder. The conviction was reversed on appeal and at the second trial the defendant was found guilty of first degree murder. This Court held that the second prosecution for first degree murder was barred by the double jeopardy clause. "Whatever may be said for the notion of continuing jeopardy with regard to an offense when a defendant has been convicted of *that offense* and has secured reversal of the conviction by appeal," the court wrote, "here Green was not convicted of first degree murder and *that offense was not involved in his appeal.*" 355 U.S. 184, 193. (emphasis supplied). The Court went on to expressly reject the Government's contention that:

> In order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal. 355 U.S. at 193.

In *Price*, the Court applied the same standard to a state prosecution to hold that a defendant charged with murder and convicted of the lesser included offense of voluntary manslaughter could not be retried on the murder charge. Upon being convicted of the misdemeanor offense of assault with a deadly weapon Perry acquired a double jeopardy bar to any subsequent prosecution for the same crime, *Ex parte Lange, supra*, or for a greater degree of the same offense arising out of the same transaction. *Gavieres v. United States, supra; Ex*

parte Nielsen, supra; Giles v. United States, supra, Under *Green* and *Price* the State may not insist that in order to appeal his conviction of the misdemeanor, Perry "must surrender his valid defense of former jeopardy not only on that offense but also on a different offense [the encompassing felony degree of the same crime] for which he was not convicted and which was not involved in his appeal." *Green v. United States,* 355 U.S. 184, 193 (1957).

It may be suggested, by way of objection to the above analysis, that in *Green* and *Price,* the first jury could be seen as having *by implication acquitted the defendant* of the first degree murder charge. Under the "implied acquittal" theory, the jury, having two degrees of an offense before it, and having convicted the defendant of the lesser degree while rendering no verdict on the greater degree, is deemed to have rendered an implied acquittal on the greater degree. This "acquittal" then precludes a subsequent prosecution for the greater offense upon retrial for the lesser offense of which the accused was convicted and from which he successfully appealed. In Perry's case no such inference of implied acquittal can be drawn since the first Court did not have before it (and, indeed, did not have jurisdiction to consider) the greater felony offense.

This objection is not convincing, for the Court in *Green* did not in fact rest its conclusion upon a theory of implied acquittal. The opinion of the Court clearly stated that "the result in this case need not rest alone on the assumption . . . that the jury for one reason or another acquitted Green of murder in the first degree." 355 U.S. at 191. The Court did mention in its opinion the fact that the jury "was given full opportunity to return a verdict of first degree murder and no extraordinary circumstances

prevented it from doing so," *Id.*, a fact, of course, not present in this case. What is present, however, was a full opportunity on the part of the State to bring the greater felony charge against Perry in one original proceeding–an opportunity of which the State did not avail itself, in spite of the fact that "no extraordinary circumstances" prevented it from doing so.[8] *Green* and *Price*, moreover, are similar to this case in that in each case the accused, following his first conviction, could not have been prosecuted for the greater offense–*unless he sought to exercise his right to appeal.*

It is this last common fact that highlights the major theme of *Green*, a theme that has been further developed in later cases and through the separate opinion of individual Justices and which applies with equal force to Perry's situation as it did to *Green*: the theme of the Court's concern with protecting the right of appeal in criminal cases. By forcing defendant to yield his valid double jeopardy barrier to conviction for a greater offense, as a condition of appealing his conviction on the lesser charge, the Government places the defendant in an "incredible dilemma." *Green v. United States*, 355 U.S. at 193. This theme was adopted by Judge (now Justice)

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[8]Contrast, *Illinois v. Sommerville*, 410 U.S. 458 (1973), wherein no double jeopardy violation occurred where a mistrial was declared after uncurable error in the indictment was discovered. The declaration of a mistrial was held required by "manifest necessity" and the "cause of public justice." Here the State deliberately chose to amend the warrant at the District Court level to charge a misdemeanor. Only after Perry appealed the misdemeanor conviction did the State seek to reassert its right to proceed on the felony charge.

Marshall in writing for the Court of Appeals in *Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965). Judge Marshall rejected the "fiction" of implied acquittal and emphasized instead the "unconscionable premium [placed] upon a successful appeal" by a rule that allowed reprosecution upon a greater offense after a successful post conviction attack on the lesser conviction. Others have found the same concern in *Green*. It teaches, wrote Mr. Justice Fortas, that:

> The Government, in its role as prosecutor, may not attach to the exercise of the right of appeal the penalty that if the appellant succeeds, he may be retried on another and more serious charge.

United States v. Ewell, 383 U.S. 116, 128 (1966) (dissenting opinion). In view of this purpose of Green, Justice Fortas concluded that "the Government may not, following vacation of a conviction, reindict a defendant for additional offenses arising out of the same transaction *but not charged in the original indictment.*" 383 U.S. at 127. (emphasis supplied). And see the dissenting opinion of Justice Fortas, joined by Justice Douglas and Chief Justice Warren in *Chihos v. Indiana, cert. dismissed as improvidently granted*, 385 U.S. 76 (1966).

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), Mr. Justice Harlan, Mr. Justice Douglas and Mr. Justice Marshall were of the opinion that the double jeopardy clause absolutely barred the State from imposing after retrial a harsher punishment than imposed at the first proceeding. Justice Harlan took note of the theory that greater punishment is prohibited at retrial because the first proceeding had by implication acquitted the defendant of a harsher sentence. He found, however, that more significant than this "fiction" was the fact that if a different construction were placed upon the double

jeopardy clause a defendant's decision whether or not to appeal "would be burdened by the consideration that success followed by retrial and reconviction, might place him in a far worse position. . . ." than he would be in had he not appealed. 395 U.S. 711, 746.[9]

It is clear that at this point the due process concerns of the *Pearce* majority and the double jeopardy arguments based on *Green* and later opinions begin to converge. They meet, and both apply, to the factual situation presented by Perry. Here the defendant, upon conviction of the lesser offense, had a clear double jeopardy bar to a second prosecution for either the same or a greater offense arising out of the same transaction. The fact that a defendant who successfully appeals his conviction yields his bar to reprosecution on the same charge *of which he already stands convicted* does not, of course, inhibit his exercise of post conviction remedies. To subject the successfully appealing defendant to prosecution on a *greater* charge, however, requires him to make a substantial sacrifice in order to appeal, a sacrifice which neither the due process or double jeopardy clauses permit the State to require. This principle was established in *Green*:

> Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on

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[9] A majority of the Court did not adopt the suggestion made by Justices Harlan, Douglas and Marshall that the double jeopardy clause bars enhanced *sentencing* as well as prosecution on a greater charge after the reversal of a conviction on a lesser charge. Their failure to do so, however, does not detract in the least from the argument made here, where a *greater offense* was charged at the de novo trial.

> another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy. 355 U.S. at 193-194, *quoted with approval in Benton v. Maryland, supra*, 395 U.S. at 796.

This principle applies with equal force here. The State sought to place as a condition to Perry obtaining a de novo review of his misdemeanor conviction and six month prison sentence the forfeiture of his double jeopardy bar to prosecution on the greater felony offense. Such a requirement is in plain conflict with the double jeopardy clause, now fully applicable to the States by virtue of the Court's decision in *Benton v. Maryland.*

Only one possible contention by the State remains to be examined. Prior to the decision in *Benton* applying federal double jeopardy standards to the States, North Carolina adopted the position that:

> [C]onviction of a minor offense in an inferior court does not bar a subsequent prosecution for a higher crime embracing the former, where the inferior court did not have jurisdiction of the higher crime. *State v. Birckhead,* 256 N.C. 494, 498, 124 S.D.2d 838, 842 (1962).

The assumption of the North Carolina law—that no jeopardy attached on a charge over which the first court lacked jurisdiction—was condemned as unprincipled as early as 1935 by the American Law Institute.

> There is also a class of cases which hold that a conviction or acquittal in a court of inferior jurisdiction is not a bar to a prosecution in a higher court for a greater crime, which includes the lesser, where the inferior court has no jurisdiction over the greater offense. If it is possible on a prosecution for the greater offense to have a conviction for the lesser offense, of which there has already been an

acquittal or conviction,[10] it would seem that these decisions are untenable in principle. ALI Administration of the Criminal Law, *Double Jeopardy*, p. 137 (official Draft 1935).

A rule allowing a subsequent prosecution for the greater offense following conviction for a lesser included offense in a court of limited jurisdiction is untenable. The fact that the first court's jurisdiction was limited bears no relation to the policies underlying the federal double jeopardy bar to subsequent prosecution. One of those policies is to prevent harrassment of the accused by the State through repeated prosecutions involving the same offense. The State is thus required to bring all its greater or lesser included charges arising out of one criminal transaction in one prosecution.[11] This rule serves the additional function of preventing the State from holding back on a charge of a greater degree of an offense in the hope that the possibility of a prosecution on the greater charge will inhibit the exercise of post conviction remedies by the accused. From the defendant's standpoint, the fact that the first court had jurisdiction to try

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[10]See note 3 *supra*.

[11]The District Court posed the issue in terms of an election:

> The State had, in effect, a choice in these matters. It may try the defendant for a misdemeanor in the District Court, or it may try a defendant for a felony in the Superior Court. But it may not try a defendant for both offenses arising out of the same incident, in two separate courts. Once there has been an election to try on one offense as opposed to the other, that election is binding.

___ F.Supp. at ___ (E.D. N.C. 1972). (See Petition For Writ of Certiorari, p. 18).

only the lesser degree makes absolutely no difference: the ordeal of a second prosecution for a higher crime and the inhibition on seeking appellate review are the same.

To allow the limited jurisdiction of the first court to serve as an excuse for avoiding the mandate of federal double jeopardy requirements could ultimately serve seriously to undemine the Constitutional guarantees against being twice put in jeopardy. Acceptance of the prosecution tactics in this case would allow a state, by the proliferation of courts with limited jurisdiction, to emasculate the protections of the double jeopardy clause. A state, for example, would be free to establish four levels of court, each with limited jurisdiction, to hear varying degrees of charges of homicide. Court 1 would have jurisdiction only over attempted murder: a conviction on that charge in Court 1 would not bar a subsequent prosecution in Court 2 for manslaughter. If the prosecutor were not satisfied with the penalty given the accused upon conviction for manslaughter, he could then bring an action in Court 3 for second degree murder, a crime over which Court 2 had no jurisdiction. The double jeopardy clause under this system, would provide no protection against the second degree murder prosecution since a conviction of one offense in an inferior court "does not bar a subsequent prosecution for a higher offense embracing the former, where the inferior Court did not have jurisdiction of the higher crime." *State v. Birckhead, supra.* By the time three convictions had been rendered and the State was proceeding to try the accused for the first degree murder of the same victim, in Court 4 (the only court with jurisdiction over the most serious degree), it is likely that the implications of *Green v. United States* and *Price v. Georgia* would become clear.

The trial de novo of Perry on felony charges following his appeal from a conviction of a misdemeanor arising out

the same conduct violated his constitutional rights of not being placed twice in jeopardy.

II.

THE ENHANCEMENT OF AN ASSAULT CHARGE FROM A MISDEMEANOR TO A FELONY AT A DE NOVO TRIAL AND THE RESTRICTION OF THE RIGHT TO TRIAL BY JURY DENIED PERRY DUE PROCESS OF LAW.

A. The Enhancement of the Charges Against Perry From the Misdemeanor to Felony Level Upon Appeal for Trial De Novo Violated Due Process of Law.

Following the conviction of Perry on the misdemeanor of assault with a deadly weapon in the District Court and the giving of notice of appeal to the Superior Court for trial de novo, the prosecutorial authorities intervened and secured a bill of indictment against Perry charging a felony for the same conduct for which the prosecutors had originally determined to proceed with a misdemeanor charge.

In *Pearce v. North Carolina, supra,* this Court held that Courts were "without right to . . . put a price on appeals. A defendant's exercise of a right to appeal must be free and unfettered. . . ." 395 U.S. at 724. The Court stated:

> Due process of law . . . requires that vindictiveness against a defendant for having sucessfully attacked his first conviction must play no part in the sentence he received after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of appre-

hension of such a retaliatory motivation on the part of the sentencing judge.

395 U.S. at 725.

In like fashion, a defendant seeking a trial de novo is entitled to assurances that the prosecutor who in the first instance charged him with a misdemeanor cannot punish the taking of an appeal by elevating the pending charge to the felony level. There can be no question that "apprehension of . . . retaliatory motivation", *Id.*, must certainly accompany any claim on the part of the prosecutors of the power to enhance charges if an appeal should be taken.

There can also be no question that the power to enhance the pending charges in the hands of the prosecutor is far greater threat to liberty than the power of a judge to increase sentence. A prosecutor, unlike a judge, is a partisan. Though the canons of ethics speak of the duty of the prosecutor to seek justice rather than conviction, it is a fiction to imagine a prosecutor in a role other than that of advocate.

Second, it is hard to conceive any motive that a prosecutor might have other than punitive for the increasing charges following an appeal. The prosecutor is free in the first instance to place charges at the felony or misdemeanor level. If certain conduct mandates criminal charges at the felony level there is no plausible reason why those charged with that determination are unable to make it in the first instance. The conclusion is inescapable that what happened to Perry could have occurred because Perry sought to exercise his right to a constitutional trial in the Superior Court.

Colten v. Kentucky, 407 U.S. 104 (1972), provides no comfort to the State. In holding that increased punishment following trial de novo did not violate the standard

of *Pearce* or due process of law, the Court reaffirmed the doctrine that vindictiveness can play no role in the sentencing of a defendant who has exercised a right of appeal. Rather the Court asserted its feeling that the two-tier system of Kentucky did not possess the inherent potential for punitive sentencing found in *Pearce*. 407 U.S. at 116. The Court found no reason to suspect that defendant would be detered from seeking a second trial out of judicial vindictiveness. *Id.*

It should require little argument to assert that defendants having been convicted of misdemeanors, will hesitate to seek their absolute right to a second trial if they come to realize that they face a potential penalty of having the charges enhanced to the felony level. Certainly if Perry had *not* appealed and had accepted the judgment of the District Court, the prosecutor could not consistent with due process and double jeopardy have filed felony charges in the Superior Court. *Gavieres v. United States, supra.* In like fashion, the prosecutor could not, consistent with due process, charge Perry with felonious assault following his conviction for misdemeanor assault merely because of the exercise of the right of appeal. *North Carolina v. Pearce, supra.*

B. The Restriction of Perry's Constitutional Right to Trial by Jury Denied Him Due Process of Law.

Perry was originally charged with a misdemeanor offense that carried a maximum imprisonment of two years, N.C.G.S. 14-33 (b)(l) and (c) (1969). Thus, being charged with an offense punishable by more than one year in prison, Perry had an absolute right to trial by jury. *Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968). He was clearly denied

that right in that he was compelled to submit to trial in District Court upon his plea of not guilty without the right to have his guilt or innocence determined by a jury. Trial by jury is not provided in District Court, N.C.G.S. 7A-196(b), and a defendant must submit to the jurisdiction of the District Court for the trial of a misdemeanor in the first instance. N.C.G.S. 7A-272. *A fortiori*, the discharge of Perry should be affirmed on this basis alone.

The State may contend that Perry was not utterly denied any access to trial by jury by suggesting that although he was indeed placed in jeopardy of punishment exceeding a year in prison in a proceeding denying that right, he remained free *thereafter* to seek trial de novo with the benefit of jury trial. The contention, however, must fail for two reasons. First, there is simply no authority whatever for the curious view that the right to trial by jury may be postponed until after jeopardy has attached, trial has proceeded through verdict, and sentence has been imposed.[12] So to disparage a constitutional right is wholly inconsistent with the function of its explicit guarantee. So to sanction its postponements is to hypothecate the Bill of Rights, to hobble the accused and to subject him to the ordeal of preliminary trial in the harrassment of which he is powerless to avoid. It is, with all respects, an Alice in Wonderland world in which the

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[12]In *Colten* no constitutional right to trial by jury existed in that the maximum permissible punishment did not exceed the minimal limits of *Baldwin v. New York, supra*. See Ky. Rev. Stat. §437-.016(2) (Supp. 1968). ("Disorderly conduct is punishable by imprisonment in jail for not more than six months, by a fine of not more than $500.00, or both.") In addition, Colton, by consent, was tried before the Court at his trial de novo. 407 U.S. at 108.

State, as the Queen of Hearts, declares: "Sentence first, trial by jury later!"

The recent decision of *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) supports this analysis. In *Ward*, the Court, in holding that a defendant was entitled to a trial before a disinterested and impartial judicial officer, rejected the argument that an unconstitutional trial can be corrected by a later de novo trial that conforms with due process.

> Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial de novo in this County Court of Criminal Pleas. We disagree. This "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be disminished by the possibility of reversal on appeal. Nor in any event may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

409 U.S. at 61-62. The holding of *Ward* is clear: A constitutional right cannot be deferred on a theory that it will be available at a subsequent de novo proceeding.

Second, the contention must fail in any case because of the price which the State attaches to the defendant's postponed right to trial by jury—the price that he must subject himself to the risk of an unexplained harsher charge and harsher sentence should he now elect to exercise that right:

> The inevitable effect of any such provision is, of course, . . . to deter exercise of the Sixth Amendment right to demand a jury trial.

United States v. Jackson, 390 U.S. 570, 581 (1968). It is of no moment that the placing upon the right to jury trial may not be the purpose of the State's scheme. It is enough that the price is there, and that the defendant is made to pay it. *United States v. Jackson, supra.*

Nor is there any similarity between Perry's predicament in this case and the Court's decision in *North Carolina v. Alford*, 400 U.S. 25 (1970), with respect to guilty plea bargaining. The lack of similarity arises from the fact that here there is no bargain. Had Perry entered a plea of guilty in the District Court, upon advice of counsel and due record made so to assure adequate review of the voluntariness of his plea entered pursuant to an understanding that he was foreclosing jury trial in exchange for the hope of leniency, *Alford* would of course be on point. But Perry made no such plea, he entertained no such design, he stood upon his claim of innocence to the misdemeanor charge as he had every right to do, and nonetheless he was subjected to trial without jury. Again, had Perry a right of election, either to submit himself to the District Court without jury but with hope of more lenient treatment than he might anticipate by electing trial by jury in Superior Court, or to submit to trial by jury in Superior Court, *Alford* might be relevant. He did not have any such choice, however, for the law of North Carolina gave him none. *Alford* is therefore wholly inappropriate, and the decision is clearly controlled by *United States v. Jackson*.

Because Perry was deprived of the right to trial by jury, and because even the postponed opportunity for jury trial was overlaid by an intimidating price, the decision in the court below must be affirmed.

III.

RESPONDENT IS ENTITLED TO RAISE HIS CLAIMS OF DOUBLE JEOPARDY AND DENIAL OF DUE PROCESS NOTWITHSTANDING HIS PLEA OF GUILTY.

Jimmy Seth Perry appealed his misdemeanor conviction because his six month sentence was made consecutive to a sentence under service. (See App. iii). Much to his consternation he found the price of this appeal to be an indictment charging a felony with a maximum imprisonment of ten years. He was totally unaware of any constitutional implications in the felony indictment. Thus, to Perry the fact of felony as opposed to a misdemeanor conviction came to be of lesser concern than the limiting of the threat of a much increased period of confinement. As noted *supra*[13] the sentence received by Perry following his plea of guilty to the felony did effectively raise the period of confinement by 17 months and one day and thus increased the sentence received in the lower court by 11 months and one day.

The State of North Carolina urges, apparently not contesting the constitutional claims at issue, that a plea of guilty by Perry invariably "waives" the right to assert this defense in his behalf at a later date. Last term this Court stated a basic test:

> "We . . . reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly

[13]See note 4, *supra*.

> admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*" [v. Richardson, 397 U.S. 759].

Tollet v. Henderson, 411 U.S. 256, 267 (1973).

The test of *Tollett v. Henderson*, while perhaps correct for the facts of that particular litigation, states a rule that must be subject to provisos in other factual settings. This particular case presents the opportunity to fashion three such provisos:

> (1) A guilty plea is subject to later constitutional attack when the constitutional claim goes to the very right of the State to place the defendant on trial on that particular charge *at all*, and/or
>
> (2) A guilty plea must be open to constitutional challenge when the constitutional claim is based on legal precedent arising after the plea of guilty and where said precedent has been accorded full retroactive effect, and/or
>
> (3) A guilty plea is open to a due process challenge where the due process claim is so fundamental as to present a claim which goes to "the very essence of a scheme of ordered liberty."

In the *Brady* trilogy[14] defendants were either asserting that a guilty plea had been induced by the fear of a

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[14] *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

potential death penalty and/or by an admission of guilt that had been illegally obtained. In *Tollett v. Henderson* defendant asserted denial of his constitutional rights by reason of the systematic exclusion of blacks from grand jury service.

What is important to note that in no instance was the claim asserted that defendant could not in fact be tried for the offense charged. Whether the relief sought be declaration of the unconstitutionality of a certain penalty provision, the exclusion of certain incriminating statements from evidence or the composing of a new grand jury to hear the case, implicit was a recognition that defendant could properly be brought before the bar to answer the charges made if only certain collateral matters were corrected. No matter how important be issues of constitutional punishment, admissibility of confessions and composition of grand juries, said issues cannot be raised as a bar to the proceeding itself.

The question raised by the *Brady* trilogy and *Tollett v. Henderson*, while conceivably affecting the determination of guilt or innocence, were not in a legal sense dispositive of the issue. Thus, in each instance the guilty plea could properly be viewed as indeed a forfeiture of the right to present the collateral constitutional claims. The defendant, by his plea having waived his privilege against self-incrimination and having affirmed his guilt, all issues unrelated to the right of the State to place the defendant on trial on the particular charge ceased to be relevant. The fact finding process having been concluded by a plea of guilty, the defendant can properly be held to have forefeited constitutional defenses that must of necessity have proceeded a determination of guilt or innocence.

But contrast the claim of double jeopardy put forth by Perry. The question of guilt or innocence is simply not

the issue. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the protection against double jeopardy is explained:

> That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

395 U.S. at 717. Thus, the admitted guilt of an accused to a criminal charge does not preclude the claim of double jeopardy. *Ex parte Nielsen*, 131 U.S. 176 (1889). The defendant asserts simply that the State does not have the right to make him answer to the particular charge. As such the plea of guilty does not make unnecessary, as it was in the *Brady* trilogy and *Tollett v. Henderson*, the resolution of the constitutional issue.

This distinction was made clear by the First Circuit in *United States v. De Costa*, 435 F. 2d 630 (1st Cir. 1970):

> We have recently held that the right to trial by jury, the right against self-incrimination, and the right to confront one's accusers are impliedly waived by a guilty plea (citation omitted). But these rights are directly related to the substantive matters that would have been presented at trial; whereas the right to a speedy trial has no direct connection to the determination of defendant's guilt or innocence. It would therefore seem to be a useless gesture and a waste of judicial resources to require a defendant to go through the motions of a formal trial in order to preserve his right to appeal the denial of his [speedy trial] motion.

435 F. 2d at 632. Coerced confessions are not reviewable following a plea of guilty, the court said, because the plea is an admission of guilt:

> As such, it is clear waiver of the right against self-incrimination, on which any subsequent attack on a coerced confession would have to be based.

435 F. 2d at 632. *See also United States v. Karger*, 439 F. 2d 1108 (1st Cir. 1970), *cert. den.*, 403 U.S. 919 (1971) (claim of preliminary hearing denial waived by plea of guilty). Thus, there is authority that:

> There is nothing inherent in the nature of a plea of guilty which *ipso facto* renders it a waiver of a defendant's constitutional claims.

United States ex. rel. Rogers v. Warden, 381 F. 2d 209, 213 (2d Cir. 1967). *See also*, ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS 31-32 (approved draft 1970).

To hold that a defendant must contest all issues of a pending prosecution or surrender totally by a plea of guilty suffers the faults which *De Costa* court diagnosed; it doesn't differentiate between those issues related to the determination of guilt at trial and those not so related. As Professor Parker noted a decade ago, some principles of due process are designed to safeguard "the reliability of [a criminal justice system's] factfinding" and others are "designed to safeguard the integrity of the process" itself. Parker, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1, 14, 16 (1964). To hold that a plea of guilty automatically surrenders all constitutional claim indis-

criminately lumps together the waiver of both types of principles.[15]

The inevitable results are well known. The defendant who has no desire to contest guilt yet does wish to contest a system-related issue, is torn. He is, on the one hand, encouraged to enter a plea of guilty – his sentence might be reduced; some charges might be dropped; his time and money might be saved. Yet, on the other hand, it might be the case that he ought *not* to be punished *despite his guilt* – he might once have been in jeopardy (even convicted and punished); he might have been given transactional immunity in return for compelled self-incrimination; he might have been awaiting trial for far too long. If a plea of guilty is said to be a blanket surrender of all issues, the inducements which encourage admissions of guilt likewise encourage surrender of system-related issues. *See* Cogan, *Guilty Pleas: Weak Links in the 'Broken Chain.'*, 10 Crim. L. Bull., No. 2 (1974).

This notion is inconsistent with the respect for certain principles that go not to guilt or innocence, but to our conception of a just system. As Professor Cogan observes:

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[15]"[A] line between guilt-related and system-related principles cannot always be clearly drawn; particularly ones drawn from centuries of common law and constitutionalized through a dozen-or-so debates, are not single faceted. Yet it would seem . . . the values which inhere, as example, in the double jeopardy and speedy trial principles cluster more closely near the ideal of a fair system of criminal justice (*qua* system) than near the ideal of an accurate one. The values which inhere in the jury trial, confrontation and cross-examination principles probably cluster conversely." Cogan, *Guilty Pleas: Weak Links in the 'Broken Chain'*, 10 Crim. L. Bull., No. 2 (1974).

> The *Brady* Court held that inducements inherent in a system which permits waiver of the issue of guilt will not render a plea of guilty involuntary. 397 U.S. at 750-753. Yet it would seem that in a contest/surrender model, where those same inducements encourage the waiver of system-related issues, they do so improperly. While it might be in a system's interest to encourage admissions of guilt (for the purpose of rehabilitation, for example), there is no interest—other than sheer efficiency—in tying the acceptance of such admissions hand-in-hand with waiver of system-related rights. Inducements encouraging such waivers are not the "inevitable attribute(s) of any *legitimate* system which tolerates and encourages the negotiation of pleas." *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973) (emphasis supplied). They are attributes of a system which demands surrender or else. To allow such inducements to operate unchecked in the interest of efficiency alone would seem to unreasonably interfere with the vindication of important rights (e.g. Reece v. Georgia, 350 U.S. 85 (1955)) and render their waiver involuntary. *Id.*

"The fundamental nature of the guarantee against double jeopardy cannot be doubted . . . like the right to trial by jury, it is clearly 'fundamental to the American scheme of justice'." *Benton v. Maryland*, 395 U.S. 784, 795-96. Given the constitutional import of double jeopardy and given the fact the integrity of the plea of guilty is unaffected by the claim of double jeopardy, a plea of guilty, standing by itself, should not be held to preclude a later constitutional claim of double jeopardy.

It is also urged that a defendant should properly be allowed to present a constitutional claim notwithstanding a plea of guilty where said claim is based on legal authority established subsequent to the plea and where

said authority has been accorded full retroactive effect. Perry entered his plea of guilty to the felony on October 29, 1969. At that time the applicable legal authority in North Carolina, *State v. Birckhead, supra,* rejected the double jeopardy claim. 265 N.C. at 497, 124 S.E.2d at 842. See page 17, *supra*. Thus, for possible double jeopardy relief Perry would have needed to examine federal authority.

At the time of his plea of guilty the Supreme Court had held in *Green v. United States, supra,* that a defendant who had been tried for first degree murder and found guilty of the lesser included offense of second degree murder, could not, following a successful appeal, be retried for first degree murder. In *Benton v. Maryland, supra,* the Court held the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment. Though these decisions certainly foretold of Perry's possible double jeopardy claims, not until the later decisions of *Price v. Georgia*, 398 U.S. 323 (June 15, 1970) and the Fourth Circuit decision of *Wood v. Ross*, 434 F.2d 297, 299 (4th Cir.) (November 16, 1970) were the actual contours of the claim clear.

"There can be no doubt of the 'retroactivity' of the Court's decision in *Benton v. Maryland*. In *North Carolina v. Pearce*, 395 U.S. 711 . . . , decided the same day as *Benton*, the Court unaminously accorded full 'retroactive' effect to the *Benton* doctrine." *Ashe v. Swenson*, 397 U.S. 436, 437 n.1. (1970).[16] Thus, if the double jeopardy rules fashioned by this Court and made

[16]See also, *Waller v. Florida*, 397 U.S. 387, 391 n. 2 (1970); *Price v. Georgia, supra,* 397 U.S. at 330 n. 9.

applicable to the State by *Benton* are to be accorded full retroactive protection, it is necessary to permit a constitutional challenge based on *Price v. Georgia, supra* and *Wood v. Ross, supra,* to proceed even in the face of a guilty plea.

In *Brady v. United States, supra,* Mr. Justice White stated for the majority: "(A) voluntary plea of guilty intelligently made in the light of then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." 397 U.S. at 757. The basis for this holding is made clear by the following language in *McMann v. Richardson, supra*:

> The defendant who pleads guilty is in a different posture. He is convicted on his counseled admission in open court that he committed the crime charged against him. The prior confession is not the basis for the judgment, has never been offered in evidence at a trial, and may never be offered in evidence. . . .
>
> What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were valid when made, and be given another choice between admitting their guilt and putting the State to its proof.

397 U.S. at 773.

The distinction in the claims made by Perry are compelling. Whether or what crime Perry committed is simply not at issue. Likewise, this is not an instance where a defendant seeks the right of making a new "choice between admitting (his) guilt and putting the State to its proof." Rather, it is asserted that double jeopardy bars the State from requiring Perry to make the choice.

The foregoing does not mean that a defendant pleading guilty can under no circumstances "waive" his claim of double jeopardy. It is suggested that the Court can rely on its "previous counsel that whether a defendant is to be precluded from establishing a claim that his constitutional rights have been infringed 'must depend, in each case, upon the particular facts and circumstances surrounding that case,' *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)." *Tollett v. Henderson, supra,* 411 U.S. at 269 (dissenting opinion). The rule can thus be stated:

> "(C)ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a *known* right or a privilege.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis supplied). Since North Carolina has a rule that all non-jurisdictional defenses (including a claim of double jeopardy) are waived by a plea of guilty, *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971), the acceptable course is to examine the record to determine if Perry deliberately bypassed review of his claim by pleading guilty. *Fay v. Noia*, 372 U.S. 391, 439 (1963). With respect to the plea of guilty, the parallel test is this—was Perry's plea an intelligent and voluntary waiver of his claim?

The majority in *Tollett v. Henderson* recognized that no waiver occurs where the constitutional claim is unknown both to defendant and his attorney. 411 U.S. at 266. Nothing in the record of this case or in the State of the law at the time of the guilty plea raises an inference that Perry and his counsel made a deliberate and knowing choice to waive a claim of double jeopardy. Waiver is not

to be presumed from a silent record. *Boykin v. Alabama*, 395 U.S. 238, 242-244, (1969); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

It is proper to ask what effect permitting a constitutional claim of double jeopardy subsequent to a guilty plea could mean to efforts to secure some sort of finality in criminal litigation. The claim of double jeopardy does not generally require extensive court time in terms of evidentiary hearings. The merit or lack thereof of such a claim is generally apparent on the face of the record. Second, it is urged that courts should have no hesitation to strike aside judgments based on charges for which a defendant could not properly be placed in jeopardy. The legitimate goal of judicial economy is not enhanced by affirming proceedings wherein the State has imprisoned persons who could not properly have been tried on the charge on which they stand convicted.

Finally, it is urged that if for no other reason, the facts of this particular case make a strong due process claim for permitting a claim of double jeopardy without regard for the plea of guilty. To permit a prosecutorial authority to enhance criminal charges from the misdemeanor to felony level as a penalty for exercising a statutory right to seek trial de novo it is submitted is "a hardship so acute and shocking that our polity will not endure it."[17] *Palko v. Connecticut*, 302 U.S. 319, 328 (1937). *See also Chambers v. Mississippi*, 410 U.S. 284 (1973). As stated in *North Carolina v. Pearce, supra*:

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[17]It is significant that a defendant charged with a misdemeanor can secure a jury trial under North Carolina law *only* by appealing the conviction in the district court to the Superior Court for trial de novo. N.C.G.S. 7A-196(b). See Section II B of the Argument, *supra*.

> A court is "without right to .... put a price on an appeal. A defendant's exercise of right of appeal must be free and unfettered . . . (I)t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice."

395 U.S. at 724. If due process dictates that vindictiveness can play no part in a decision by a court regarding sentence following a new trial after a successful appeal, then surely a prosecutor is not free consistent with due process to penalize the exercise of appeal rights by enhancing the charges which the defendant must face. In an instance where the constitutional claim is bolstered by an independent due process claim, respect for the integrity of our judicial system should set aside any argument that a plea of guilty has closed off judicial scrutiny of prosecutorial action which if allowed to stand would threaten "the very essence of a scheme of ordered liberty." *Palko v. Connecticut, supra,* 302 U.S. at 325. To paraphrase Mr. Justice Brandeis, the guarantee of due process exists "not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States,* 272 U.S. 52, 293 (1926) (dissenting opinion).

IV.

BOYKIN V. ALABAMA, 395 U.S. 238, REQUIRES A FULL STATEMENT TO A DEFENDANT OF THE RIGHTS WAIVED BY A PLEA OF GUILTY. FAILURE TO WARN PERRY THAT HIS PLEA OF GUILTY COULD CONSTITUTE WAIVER OF DOUBLE JEOPARDY AND DUE PROCESS CLAIMS REQUIRES A DETERMINATION OF THE MERITS OF THESE ISSUES.

This court has made clear by the *Brady* trilogy and *Tollett v. Henderson*, that a plea of guilty, being an

admission of the validity of the pending charge, is a grave and solemn act not lightly to be disregarded and set aside. In the process of insulating guilty pleas from later attack based on allegations of constitutional issues, the Court has likewise seen fit to assure that the guilty plea is accepted with a full understanding by a defendant of the full consequences of his act.

Thus, in *Brady v. United States, supra,* it is stated:

> Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done without sufficient awareness of the relevant circumstances and likely consequences.

Brady v. United States, 397 U.S. at 748; see also, *McMann v. Richardson, supra,* 397 U.S. at 766.

In *Boykin v. Alabama*, 395 U.S. 238 (1969), the requirements for acceptance of a guilty plea were made specific. *Boykin* established the proposition that "it (is) error . . . for the trial judge to accept (a) guilty plea without an affirmative showing that it was intelligent and voluntary." 395 U.S. at 242. The Court held:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. . . . Second, is the right to trial by jury . . . Third, is the right to confront one's accusers. . . We cannot presume a waiver of these three important federal rights from a silent record.

395 U.S. at 243. See also *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

Several state appellate courts have held that *Boykin* at a minimum means that each of the three enumerated

rights—self incrimination, confrontation, and jury trial—must be specifically and expressly set forth for the benefit of and waived by the accused prior to acceptance of his guilty plea. *In re Tahl*, 1 Cal.3rd 122, 460 P.2d 499 (1969) *cert. den.*, 398 U.S. 911; *Bishop v. Langlois*, 106 R.I. 56, 256 A.2d 20 (1969); *McBain v. Maxwell*, 2 Wash. App. 27, 466 P.2d 177 (1970). The explicit rationale of these authorities is that mere inference of waiver is no longer sufficient; that the rights waived must be enumerated and responses elicited from the person of the defendant. But, cf. *Wade v. Coiner*, 468 F.2d 1059 (4th Cir. 1972).

Given the grave consequences of a plea of guilty, *Tollett v. Henderson, supra,* and the requirement of an explicit record showing a waiver of constitutional rights in cases where a guilty plea is entered, *Boykin v. Alabama, supra,* no inference should be allowed that Perry has "waived" his constitutional protection against double jeopardy. The record in this case discloses that Perry was asked a series of form questions; that he did acknowledge his right to trial by jury and did declare that his constitutional rights had not been violated. But with the possible exception of the right to trial by jury, there is no acknowledgement of the nature of the constitutional rights at issue, and more importantly, no indication of an awareness that the guilty plea amounts to a surrender of these rights.

In *Tollett v. Henderson, supra,* it is noted:

> A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry.

411 U.S. at 267.

The language is inappropriate wherein a constitutional claim that goes to the heart of the right of the state to place the defendant in jeopardy is presented. To permit a defendant, unaware of his double jeopardy or due process claim, to be bound by the form of a guilty plea as opposed to the substance of his constitutional claim is to exalt in this instance the procedural over the substantive.

The issue simply stated is: Can the State of North Carolina imprison Perry on a criminal charge for which the State had no right to place him in jeopardy simply because of the entry of a guilty plea where the double jeopardy claim is not even known to the defendant? For a waiver of constitutional claims by reason of a guilty plea to be valid under the due process clause, it "must be 'an intentional relinquishment or abandonment of a known right or privilege'." *McCarthy v. United States, supra*, 394 U.S. at 466.

Perry, neither having relinquished or waived either his double jeopardy or due process claim by reason of any knowing or intelligent act, must be permitted to have the claim litigated on its merits.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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Attorney for Respondent

APPENDIX

General Court of Justice
6th Judicial District
CLERK SUPERIOR COURT
NORTHAMPTON COUNTY
JACKSON, NORTH CAROLINA
December 17, 1973

R. J. WHITE, JR., Clerk,
Ex Officio Judge of Probate

BERT M. MONTAGUE, Director
Administrative Office of the Courts
PERRY MARTIN
Resident Judge

Mr. Jim Keenan
Attorney at Law
P. O. Box 1003
Durham, North Carolina 27702

Re: State v. Jimmy Perry
69-Cr-2135

Dear Mr. Keenan:

When the above-named case was heard in the Northampton County District Court at the August 20, 1969, session, the defendant was originally charged in the warrant with misdemeanor assault with deadly weapon. Mr. Russell H. Johnson, Jr., was appointed to represent him. At that time, Mr. W.E. Murphrey, III, Assistant Solicitor, moved to amend the warrant to charge felonious assault and the motion was allowed. However, it was amended again to charge misdemeanor assault and was found by the Court to be guilty. My records do not indicate that any sentence at this time was finally imposed, but they do indicate that the defendant gave notice of appeal and, at that time, the Court found

probable cause and the case was bound over to Superior Court.

I am enclosing certified copies of excerpts from the minutes of this session of court in respect to this particular case. I am also enclosing copy of page taken from the Judge's calendar which are not a part of the minutes but it does indicate that there was some controversy involved.

If I can be of further assistance, please advise.

Sincerely,

/s/ Miriam W. Pruden
Miriam W. Pruden
Assistant Clerk

Enclosures (6)

Syllabus

BLACKLEDGE, WARDEN, ET AL. *v.* PERRY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72–1660. Argued February 19, 1974—Decided May 20, 1974

Respondent, a North Carolina prison inmate, had an altercation with another prisoner, and was charged with the misdemeanor of assault with a deadly weapon, of which he was convicted in the State District Court. While respondent's subsequent appeal was pending in the Superior Court, where he had the right to a trial *de novo*, the prosecutor obtained an indictment covering the same conduct for the felony offense of assault with a deadly weapon with intent to kill and inflict serious bodily injury, to which respondent pleaded guilty. Thereafter, respondent applied for a writ of habeas corpus in Federal District Court, claiming, *inter alia*, that the felony indictment deprived him of due process. The District Court granted the writ, and the Court of Appeals affirmed. *Held:*

1. The indictment on the felony charge contravened the Due Process Clause of the Fourteenth Amendment, since a person convicted of a misdemeanor in North Carolina is entitled to pursue his right under state law to a trial *de novo* without apprehension that the State will retaliate by substituting a more serious charge for the original one and thus subject him to a significantly increased potential period of incarceration. Cf. *North Carolina* v. *Pearce*, 395 U. S. 711. Pp. 24–29.

2. Since North Carolina, having chosen originally to proceed against respondent on the misdemeanor charge in the State District Court, was precluded by the Due Process Clause from even prosecuting respondent for the more serious charge in the Superior Court, respondent's guilty plea to the felony charge did not bar him from raising his constitutional claim in the federal habeas corpus proceeding. *Tollett* v. *Henderson*, 411 U. S. 258, distinguished. Pp. 29–31.

Affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in Part II of which POWELL, J., joined, *post*, p. 32.

Richard N. League, Assistant Attorney General of North Carolina, argued the cause for petitioners. With him on the brief was *Robert Morgan*, Attorney General.

James E. Keenan, by appointment of the Court, 414 U. S. 1020, argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

While serving a term of imprisonment in a North Carolina penitentiary, the respondent Perry became involved in an altercation with another inmate. A warrant issued, charging Perry with the misdemeanor of assault with a deadly weapon, N. C. Gen. Stat. § 14–33 (b)(1) (1969). Under North Carolina law, the District Court Division of the General Court of Justice has exclusive jurisdiction for the trial of misdemeanors. N. C. Gen. Stat. § 7A–272. Following a trial without a jury in the District Court of Northampton County, Perry was convicted of this misdemeanor and given a six-month sentence, to be served after completion of the prison term he was then serving.

Perry then filed a notice of appeal to the Northampton County Superior Court. Under North Carolina law, a person convicted in the District Court has a right to a trial *de novo* in the Superior Court. N. C. Gen. Stat. §§ 7A–290, 15–177.1. The right to trial *de novo* is absolute, there being no need for the appellant to allege error in the original proceeding. When an appeal is taken, the statutory scheme provides that the slate is wiped clean; the prior conviction is annulled, and the prosecution and the defense begin anew in the Superior Court.[1]

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[1] See generally *State* v. *Spencer*, 276 N. C. 535, 173 S. E. 2d 765; *State* v. *Sparrow*, 276 N. C. 499, 173 S. E. 2d 897.

After the filing of the notice of appeal, but prior to the respondent's appearance for trial *de novo* in the Superior Court, the prosecutor obtained an indictment from a grand jury, charging Perry with the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury, N. C. Gen. Stat. § 14–32 (a) (1969). The indictment covered the same conduct for which Perry had been tried and convicted in the District Court. Perry entered a plea of guilty to the indictment in the Superior Court, and was sentenced to a term of five to seven years in the penitentiary, to be served concurrently with the identical prison sentence he was then serving.[2]

A number of months later, the respondent filed an application for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. He claimed that the indictment on the felony charge in the Superior Court constituted double jeopardy and also deprived him of due process of law. In an unreported opinion, the District Court dismissed the petition for failure to exhaust available state remedies. The United States Court of Appeals for the Fourth Circuit

[2] The respondent's guilty plea was apparently premised on the expectation that any sentence he received in the Superior Court would be served concurrently with the sentence he was then serving, as contrasted with the consecutive sentence imposed in the District Court. That expectation was fulfilled, but it turned out that the guilty plea resulted in increasing the respondent's potential term of incarceration. Under applicable North Carolina law, the five- to seven-year assault sentence did not commence until the date of the guilty plea, October 29, 1969. By that time, Perry had already served some 17 months of the sentence he was serving at the time of the alleged assault. Thus, the effect of the five- to seven-year concurrent sentence on the assault charge was to increase his potential period of confinement by these 17 months, as opposed to the six-month increase envisaged by the District Court's consecutive sentence.

reversed, holding that resort to the state courts would be futile, because the Supreme Court of North Carolina had consistently rejected the constitutional claims presented by Perry in his petition. 453 F. 2d 856.[3] The case was remanded to the District Court for further proceedings.

On remand, the District Court granted the writ. It held that the bringing of the felony charge after the filing of the appeal violated Perry's rights under the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784. The District Court further held that the respondent had not, by his guilty plea in the Superior Court, waived his right to raise his constitutional claims in the federal habeas corpus proceeding. The Court of Appeals affirmed the judgment in a brief *per curiam* opinion. We granted certiorari, 414 U. S. 908, to consider the seemingly important issues presented by this case.

I

As in the District Court, Perry directs two independent constitutional attacks upon the conduct of the

[3] The Court of Appeals further instructed the District Court to await the ruling of this Court in *Rice* v. *North Carolina*, 434 F. 2d 297 (CA4), cert. granted, 401 U. S. 1008. *Rice* involved a challenge to the constitutionality of an enhanced penalty received after a criminal defendant had sought a trial *de novo* under North Carolina's two-tiered misdemeanor adjudication system. This Court did not reach the merits of this issue in *Rice*, instead vacating and remanding to the Court of Appeals for consideration as to whether the case had become moot. 404 U. S. 244.

Subsequently, in *Colten* v. *Kentucky*, 407 U. S. 104, we dealt with the merits of this issue, and held that the imposition of an increased sentence on trial *de novo* did not violate either the Due Process or the Double Jeopardy Clause. The District Court in the present case had the benefit of the *Colten* decision before issuing its opinion granting habeas corpus relief.

State in haling him into court on the felony charge after he took an appeal from the misdemeanor conviction. First, he contends that the felony indictment in the Superior Court placed him in double jeopardy, since he had already been convicted on the lesser included misdemeanor charge in the District Court. Second, he urges that the indictment on the felony charge constituted a penalty for his exercising his statutory right to appeal, and thus contravened the Due Process Clause of the Fourteenth Amendment.[4] We find it necessary to reach only the latter claim.

Perry's due process arguments are derived substantially from *North Carolina* v. *Pearce*, 395 U. S. 711, and its progeny. In *Pearce*, the Court considered the constitutional problems presented when, following a successful appeal and reconviction, a criminal defendant was subjected to a greater punishment than that imposed at the first trial. While we concluded that such a harsher sentence was not absolutely precluded by either the Double Jeopardy or Due Process Clause, we emphasized that "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law." *Id.*, at 724. Because "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives

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[4] This Court has never held that the States are constitutionally required to establish avenues of appellate review of criminal convictions. Nonetheless, "it is now fundamental that once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager*, 384 U. S. 305, 310. See also *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S. 353; *Lane* v. *Brown*, 372 U. S. 477; *Draper* v. *Washington*, 372 U. S. 487; *North Carolina* v. *Pearce*, 395 U. S. 711, 724–725; *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 24 n. 11.

after a new trial," *id.*, at 725, we held that an increased sentence could not be imposed upon retrial unless the sentencing judge placed certain specified findings on the record.

In *Colten* v. *Kentucky*, 407 U. S. 104, the Court was called upon to decide the applicability of the *Pearce* holding to Kentucky's two-tiered system of criminal adjudication. Kentucky, like North Carolina, allows a misdemeanor defendant convicted in an inferior trial court to seek a trial *de novo* in a court of general jurisdiction.[5] The appellant in *Colten* claimed that the Constitution prevented the court of general jurisdiction, after trial *de novo*, from imposing a sentence in excess of that imposed in the court of original trial. This Court rejected the *Pearce* analogy. Emphasizing that *Pearce* was directed at insuring the absence of "vindictiveness" against a criminal defendant who attacked his initial conviction on appeal, the Court found such dangers greatly minimized on the facts presented in *Colten*. In contrast to *Pearce*, the court that imposed the increased sentence after retrial in *Colten* was not the one whose original judgment had prompted an appellate reversal; thus, there was little possibility that an increased sentence on trial *de novo* could have been motivated by personal vindictiveness on the part of the sentencing judge. Hence, the Court thought the prophylactic rule of *Pearce* unnecessary in the *de novo* trial and sentencing context of *Colten*.

The *Pearce* decision was again interpreted by this Court last Term in *Chaffin* v. *Stynchcombe*, 412 U. S. 17, in the setting of Georgia's system under which sentencing responsibility is entrusted to the jury. Upon retrial following the reversal of his original conviction, the

[5] For a more exhaustive list of States employing similar two-tiered procedures, see *Colten*, *supra*, at 112 n. 4.

defendant in *Chaffin* was reconvicted and sentenced to a greater term than had been imposed by the initial jury. Concentrating again on the issue of vindictiveness, the Court found no violation of the *Pearce* rule. It was noted that the second jury was completely unaware of the original sentence, and thus could hardly have sought to "punish" Chaffin for his successful appeal. Moreover, the jury, unlike a judge who had been reversed on appeal, could hardly have a stake in the prior conviction or any motivation to discourage criminal defendants from seeking appellate review. Hence, it was concluded that the danger of vindictiveness under the circumstances of the case was *"de minimis," id.*, at 26, and did not require adoption of the constitutional rule set out in *Pearce*.

The lesson that emerges from *Pearce*, *Colten*, and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness." Unlike the circumstances presented by those cases, however, in the situation here the central figure is not the judge or the jury, but the prosecutor. The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case. We conclude that the answer must be in the affirmative.

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such

appeals—by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial.

There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." 395 U. S., at 725. We think it clear that the same considerations apply here. A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.[6] Cf. *United States* v. *Jackson*, 390 U. S. 570.

Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process. We hold, therefore, that it was not constitutionally permissible for the State to respond

[6] Moreover, even putting to one side the potentiality of increased incarceration, conviction of a "felony" often entails more serious collateral consequences than those incurred through a misdemeanor conviction. See generally Special Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929, 955–960; Note, Civil Disabilities of Felons, 53 Va. L. Rev. 403, 406–408. Cf. *O'Brien* v. *Skinner*, 414 U. S. 524 (involving New York law under which convicted misdemeanants retain the right to vote).

to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*.[7]

II

The remaining question is whether, because of his guilty plea to the felony charge in the Superior Court, Perry is precluded from raising his constitutional claims in this federal habeas corpus proceeding. In contending that such is the case, petitioners rely chiefly on this Court's decision last Term in *Tollett* v. *Henderson*, 411 U. S. 258.

The precise issue presented in *Tollett* was "whether a state prisoner, pleading guilty with the advice of counsel, may later obtain release through federal habeas corpus by proving only that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury." *Id.*, at 260. The Court answered that question in the negative. Relying primarily on the guilty-plea trilogy of *Brady* v. *United States*, 397 U. S. 742, *McMann* v. *Richardson*, 397 U. S. 759, and *Parker* v. *North Carolina*, 397 U. S. 790, the Court characterized the guilty plea as "a break in the chain of events which has preceded it in the criminal process." 411 U. S., at 267. Accordingly, the Court held that when a criminal defendant enters a guilty plea, "he may not thereafter raise independent claims relating to the deprivation of con-

[7] This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in *Diaz* v. *United States*, 223 U. S. 442. In that case the defendant was originally tried and convicted for assault and battery. Subsequent to the original trial, the assault victim died, and the defendant was then tried and convicted for homicide. Obviously, it would not have been possible for the authorities in *Diaz* to have originally proceeded against the defendant on the more serious charge, since the crime of homicide was not complete until after the victim's death.

stitutional rights that occurred prior to the entry of the guilty plea." *Ibid.* Rather, a person complaining of such "antecedent constitutional violations," *id.*, at 266, is limited in a federal habeas corpus proceeding to attacks on the voluntary and intelligent nature of the guilty plea, through proof that the advice received from counsel was not "within the range of competence demanded of attorneys in criminal cases." See *McMann, supra*, at 771.

While petitioners' reliance upon the *Tollett* opinion is understandable, there is a fundamental distinction between this case and that one. Although the underlying claims presented in *Tollett* and the *Brady* trilogy were of constitutional dimensions, none went to the very power of the State to bring the defendant into court to answer the charge brought against him. The defendants in *McMann* v. *Richardson*, for example, could surely have been brought to trial without the use of the allegedly coerced confessions, and even a tainted indictment of the sort alleged in *Tollett* could have been "cured" through a new indictment by a properly selected grand jury. In the case at hand, by contrast, the nature of the underlying constitutional infirmity is markedly different. Having chosen originally to proceed on the misdemeanor charge in the District Court, the State of North Carolina was, under the facts of this case, simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court. Unlike the defendant in *Tollett*, Perry is not complaining of "antecedent constitutional violations" or of a "deprivation of constitutional rights that occurred prior to the entry of the guilty plea." 411 U. S., at 266, 267. Rather, the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge. The very initiation of the proceedings against

him in the Superior Court thus operated to deny him due process of law.

Last Term in *Robinson* v. *Neil*, 409 U. S. 505, in explaining why the Double Jeopardy Clause is distinctive, the Court noted that "its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." *Id.*, at 509. While our judgment today is not based upon the Double Jeopardy Clause, we think that the quoted language aptly describes the due process right upon which our judgment is based. The "practical result" dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require Perry to answer to the felony charge. That being so, it follows that his guilty plea did not foreclose him from attacking his conviction in the Superior Court proceedings through a federal writ of habeas corpus.[8]

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[8] Contrary to the dissenting opinion, our decision today does not "assure that no penalty whatever will be imposed" on respondent. *Post*, at 39. While the Due Process Clause of the Fourteenth Amendment bars trial of Perry on the felony assault charges in the Superior Court, North Carolina is wholly free to conduct a trial *de novo* in the Superior Court on the original misdemeanor assault charge. Indeed, this is precisely the course that Perry has invited, by filing an appeal from the original judgment of the District Court.

The dissenting opinion also seems to misconceive the nature of the due process right at stake here. If this were a case involving simply an increased sentence violative of the *Pearce* rule, a remand for resentencing would be in order. Our holding today, however, is not that Perry was denied due process by the length of the sentence imposed by the Superior Court, but rather by the very institution of the felony indictment against him. While we reach this conclusion in partial reliance on the analogy of *Pearce* and its progeny, the due process violation here is not the same as was involved in those cases, and cannot be remedied solely through a resentencing procedure in the Superior Court. Cf. n. 6, *supra*.

Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is affirmed. *It is so ordered.*

MR. JUSTICE REHNQUIST, dissenting.

I would find it more difficult than the Court apparently does in Part I of its opinion to conclude that the very bringing of more serious charges against respondent following his request for a trial *de novo* violated due process as defined in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). Still more importantly, I believe the Court's conclusion that respondent may assert the Court's newfound *Pearce* claim in this federal habeas action, despite his plea of guilty to the charges brought after his invocation of his statutory right to a trial *de novo*, marks an unwarranted departure from the principles we have recently enunciated in *Tollett* v. *Henderson*, 411 U. S. 258 (1973), and the *Brady* trilogy, *Brady* v. *United States*, 397 U. S. 742 (1970), *McMann* v. *Richardson*, 397 U. S. 759 (1970), and *Parker* v. *North Carolina*, 397 U. S. 790 (1970).

I

As the Court notes, in addition to his claim based on *Pearce*, respondent contends that his felony indictment in the Superior Court violated his rights under the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969). Presumably because we have earlier held that "the jeopardy incident to" a trial does "not extend to an offense beyond [the trial court's] jurisdiction," *Diaz* v. *United States*, 223 U. S. 442, 449 (1912), the Court rests its decision instead on the Fourteenth Amendment due process doctrine of *Pearce*. In so doing, I think the Court too readily equates the role of the prosecutor, who is a natural adversary of the defendant and who, we observed in

Chaffin v. *Stynchcombe*, 412 U. S. 17, 27 n. 13 (1973), "often request[s] more than [he] can reasonably expect to get," with that of the sentencing judge in *Pearce*. I also think the Court passes too lightly over the reasoning of *Colten* v. *Kentucky*, 407 U. S. 104 (1972), in which we held that imposition of the prophylactic rule of *Pearce* was not necessary in Kentucky's two-tier system for *de novo* appeals from justice court convictions, even though the judge at retrial might impose a more severe sentence than had been imposed by the justice court after the original trial.

The concurring opinion in *Pearce*, 395 U. S. 711, 726, took the position that the imposition of a penalty after retrial which exceeded the penalty imposed after the first trial violated the guarantee against double jeopardy. But the opinion of the Court, relying on cases such as *United States* v. *Ball*, 163 U. S. 662 (1896), and *Stroud* v. *United States*, 251 U. S. 15 (1919), specifically rejected such an approach to the case. The Court went on to hold "that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction." 395 U. S., at 723. The Court concluded by holding that due process "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Id.*, at 725. To make certain that those requirements of due process were met, the Court laid down the rule that "whenever a judge imposes a more severe sentence upon a defendant after

a new trial, the reasons for his doing so must affirmatively appear." *Id.*, at 726. Thus the avowed purpose of the remedy fashioned in *Pearce* was to prevent judicial vindictiveness from resulting in longer sentences after a retrial following successful appeal.

Since in theory if not in practice the second sentence in the *Pearce* situation might be expected to be the same as the first unless influenced by vindictiveness or by intervening conduct of the defendant, in theory at least the remedy mandated there reached no further than the identified wrong. The same cannot be said here. For while indictment on more serious charges after a successful appeal would present a problem closely analogous to that in *Pearce* in this respect, the bringing of more serious charges after a defendant's exercise of his absolute right to a trial *de novo* in North Carolina's two-tier system does not. The prosecutor here elected to proceed initially in the State District Court where felony charges could not be prosecuted, for reasons which may well have been unrelated to whether he believed respondent was guilty of and could be convicted of the felony with which he was later charged. Both prosecutor and defendant stand to benefit from an initial prosecution in the District Court, the prosecutor at least from its less burdensome procedures and the defendant from the opportunity for an initial acquittal and the limited penalties. With the countervailing reasons for proceeding only on the misdemeanor charge in the District Court no longer applicable once the defendant has invoked his statutory right to a trial *de novo*, a prosecutor need not be vindictive to seek to indict and convict a defendant of the more serious of the two crimes of which he believes him guilty. Thus even if one accepts the Court's equation of prosecutorial vindictiveness with judicial vindictiveness, here, unlike *Pearce*, the Court's remedy reaches far beyond the wrong it identifies.

Indeed, it is not a little puzzling that the Court's remedy is the same that would follow upon a conclusion that the bringing of the new charges violated respondent's rights under the Double Jeopardy Clause. And the Court's conclusion that "[t]he very initiation of the proceedings against [respondent] in the Superior Court thus operated to deny him due process of law" surely sounds in the language of double jeopardy, however it may be dressed in due process garb.

II

If the Court is correct in stating the consequences of upholding respondent's constitutional claim here, and indeed the State lacked the very power to bring him to trial, I believe this case is governed by cases culminating in *Tollett* v. *Henderson*, 411 U. S. 258 (1973). In that case the State no doubt lacked "power" to bring Henderson to trial without a valid grand jury indictment; yet that constitutional disability was held by us to be merged in the guilty plea. I do not see why a constitutional claim the consequences of which make it the identical twin of double jeopardy may not, like double jeopardy, be waived by the person for whose benefit it is accorded. *Kepner* v. *United States*, 195 U. S. 100, 131 (1904); *Harris* v. *United States*, 237 F. 2d 274, 277 (CA8 1956); *Kistner* v. *United States*, 332 F. 2d 978, 980 (CA8 1964).

In *Tollett* v. *Henderson*, *supra*, we held that "just as the guilty pleas in the *Brady* trilogy were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations there, . . . respondent's guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury." 411 U. S., at 266. Surely the due process violation found by the Court today is no less "antecedent" than the constitutional violations claimed to make the

grand jury indictment invalid in *Tollett* v. *Henderson*, the confession inadmissible in *McMann*, or the exercise of the right to a jury trial impermissibly burdened in *Brady* and *Parker*. As the Court notes, we reaffirmed in *Tollett* v. *Henderson* the principle of the *Brady* trilogy that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." 411 U. S., at 267. We went on to say there:

> "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*." *Ibid.*

The assertion by the Court that this reasoning is somehow inapplicable here because the claim goes "to the very power of the State to bring the defendant into court to answer the charge brought against him" is little other than a conclusion. Any difference between the issue resolved the other way in *Tollett* v. *Henderson* and the issue before us today is at most semantic. But the Court's "test" not only fails to distinguish *Henderson;* it also fails to provide any reasoned basis on which to approach such questions as whether a speedy trial claim is merged in a guilty plea. I believe the Court's departure today from the principles of *Henderson* and the cases preceding it must be recognized as a potentially major breach in the wall of certainty surrounding guilty pleas for which we have found constitutional sanction in those cases.

There is no indication in this record that respondent's guilty plea was the result of an agreement with the prose-

cutor. But the Court's basis for distinguishing the *Henderson* and *Brady* cases seems so insubstantial as to permit the doctrine of this case to apply to guilty pleas which have been obtained as a result of "plea bargains." In that event it will be not merely the State which stands to lose, but the accused defendant in the position of the respondent as well. Since the great majority of criminal cases are resolved by plea bargaining, defendants as a class have at least as great an interest in the finality of voluntary guilty pleas as do prosecutors. If that finality may be swept aside with the ease exhibited by the Court's approach today, prosecutors will have a reduced incentive to bargain, to the detriment of the many defendants for whom plea bargaining offers the only hope for ameliorating the consequences to them of a serious criminal charge.

III

But if, as I believe, a proper analysis of respondent's constitutional claim produces at most a violation of the standards laid down in *North Carolina* v. *Pearce*, *supra*, I agree with the Court, though not for the reasons it gives, that respondent's claim was not merged in his guilty plea. Imposition of sentence in violation of *Pearce* is not an "antecedent constitutional violation," since sentence is customarily imposed after a plea of guilty, and is a separate legal event from the determination by the Court that the defendant is in fact guilty of the offense with which he is charged.

If respondent's claim is properly analyzed in terms of *Pearce*, I would think that a result quite different from that mandated in the Court's opinion would obtain. *Pearce* and the decisions following it have made it clear that the wrong lies in the increased sentence, not in the judgment of conviction, and that the remedy for a *Pearce* defect is a remand for sentencing consistent with due

process. *North Carolina* v. *Rice*, 404 U. S. 244, 247–248 (1971). In *Rice* we concluded that the Court of Appeals had erred in ruling that *Pearce* authorized the expunging of Rice's conviction after his trial *de novo* in North Carolina:

> "It could not be clearer . . . that *Pearce* does not invalidate the conviction that resulted from Rice's second trial . . . . *Pearce*, in short, requires only resentencing; the conviction is not *ipso facto* set aside and a new trial required. Even if the higher sentence imposed after Rice's trial *de novo* was vulnerable under *Pearce*, Rice was entitled neither to have his conviction erased nor to avoid the collateral consequences flowing from that conviction and a proper sentence." *Ibid.*

Since Rice had completely served his sentence, rather than reaching the merits of Rice's *Pearce* claim, we remanded for a determination whether any collateral consequences flowed from his service of the longer sentence imposed after retrial, or whether the case was moot.

Here, while respondent faced the prospect of a more severe sentence at the conclusion of his felony trial in the Superior Court of North Carolina, it was by no means self-evident that this would be the result. The maximum sentence which he could receive on the misdemeanor count was one and one-half years, but nothing in the record indicates that the Superior Court judge might not impose a lesser penalty than that, or even grant probation. Nor is there any indication in the habeas record, which contains only a fragment of the state court proceedings, that the Superior Court judge might not at the conclusion of the trial and after a verdict of guilty have before him for sentencing purposes information which would support an augmented sentence under *Pearce*. In fact, the habeas court found that the sentence actually

imposed was more severe than that which could have been imposed under the misdemeanor charge. But the remedy for that violation should be a direction to the state court to resentence in accordance with *Pearce*, rather than an order completely annulling the conviction. Respondent was originally convicted of assaulting a fellow inmate with a deadly weapon, and later pleaded guilty to a charge of assaulting the inmate with a deadly weapon with intent to kill him. But in spite of both a verdict of guilty on one charge and a plea of guilty to the other, the Court's decision may well, as a practical matter, assure that no penalty whatever will be imposed on him.

MR. JUSTICE POWELL joins in Part II of this opinion.